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Repository Citation

David McCord, *Is Death "Different" for Purposes of Harmless Error Analysis? Should It Be?: An Assessment of United States and Louisiana Supreme Court Case Law*, 59 La. L. Rev. (1999)

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Is Death "Different" for Purposes of Harmless Error Analysis? Should It Be?: An Assessment of United States and Louisiana Supreme Court Case Law

David McCord

I. INTRODUCTION

At first blush, juxtaposing the terms "death sentence" and "harmless error" seems counterintuitive—much like combining "garbage" and "delicious," or "slum housing" and "luxurious." Yet if society is to have death sentence adjudications, the question of harmless error will loom large, because few trials of any sort—let alone capital cases, which tend to be more complex than noncapital criminal cases—are perfect. The purpose of this Article is to examine the troubling intersection between capital cases and the concept of harmless error.¹

I will explore the problem in three sections. In Part II, I will explain how death is "different" under the jurisprudence of the United States Supreme Court.

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1. Others have discussed aspects of this topic before me, and I have greatly benefited from their contributions. My article is, though, to my knowledge, the first to examine harmless error in death penalty cases at all stages of the proceedings, from voir dire through the penalty phase. See, Linda E. Carter, *Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied*, 28 Ga. L. Rev. 125, 165-66 (1993) (arguing that a different and very narrow harmless error doctrine should apply to the sentencing phase because, "The value-based nature of the decision in the penalty phase of a capital case, weighing aggravating and mitigating factors, renders it difficult, at best, to calculate the effect of an error."); C. Elliot Kessler, *Death and Harmlessness: Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases—A Comparison & Critique*, 26 U.S.F. L. Rev. 41, 90 (1991) (concluding that neither the liberal nor the conservative California Supreme Court dealt fairly with harmless error concepts in capital cases: the *Bird* liberal court applied a rule of automatic reversal; the conservative *Lucas* court applied it as a virtual barrier to reversal); Marla L. Mitchell, *The Wizardry of Harmless Error: Brain, Heart, Courage Required When Reviewing Capital Sentences*, 4 Kan. J.L. & Pub. Pol'y 51, 59 (1994) (arguing that the Kansas legislature enacted the death penalty contrary to the wishes of the citizenry, and that the Kansas Supreme Court should apply a rule of automatic reversal for capital sentencing to reflect the conscience of the community); James C. Scoville, Comment, *Deadly Mistakes: Harmless Error in Capital Sentencing*, 54 U. Chi. L. Rev. 740, 758 (1987) (arguing for rule of automatic reversal in capital sentencing). For a helpful discussion of harmless error jurisprudence generally, see Gregory Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 Cal. L. Rev. 1335, 1368-69 (1994) (arguing that the resolution of a defendant's claim of error too often depends on which standard of review a court chooses, rather than on the merits of the claim).

We will discover that death is not different across the board, but in two particular ways: the level of proportionality scrutiny for statutory death eligibility criteria, and the penalty phase (including voir dire on the topic of death sentencing attitudes). In Part III, I will set forth the Court's harmless error jurisprudence and show how it is reflected in the jurisprudence of the Louisiana Supreme Court. We will find that capital cases are not much different for either court for harmless error purposes. Then, in Part IV, I will detail how the "death-is-different principle" intersects with harmless error analysis at specific stages of capital proceedings, from pretrial matters through the penalty phase in the case law of both the United States and Louisiana Supreme Courts. At pertinent junctures in each Part, I will offer my assessments of the virtues and defects of the jurisprudence of both courts.

II. HOW DEATH IS "DIFFERENT" UNDER UNITED STATES SUPREME COURT JURISPRUDENCE

The United States Supreme Court has often proclaimed that "death is different."² And, indeed, there are important ways in which constitutional law concerning the death penalty is different than that relating to any lesser form of punishment.³ But close examination reveals that death is *not* different *across the board*. Rather, death has been treated differently by the Court primarily in two particular aspects—statutory death eligibility, and the penalty phase—and not others. In subparts A and B, below, I will describe the basics of how the court has treated death differently as to statutory death eligibility and the penalty phase. Then, as part of my discussion of the intersection of the death-is-different and harmless error doctrines in Part IV, I will examine other ways in which death is different, as well as significant ways in which it is not.

2. See *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978, 2991 (1976) ("[D]eath is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two."). See also, e.g., *Lankford v. Idaho*, 500 U.S. 110, 125, 111 S. Ct. 1723-1732 (1991); *Clemons v. Mississippi*, 494 U.S. 738, 750 n.4, 110 S. Ct. 1441, 1449 n.4 (1990); *Booth v. Maryland*, 482 U.S. 496, 509 n.12, 107 S. Ct. 2529, 2536 n.12 (1987); *Solem v. Helm*, 463 U.S. 277, 289, 103 S. Ct. 3001, 3009 (1983); *Enmund v. Florida*, 458 U.S. 782, 797, 102 S. Ct. 3368, 3377 (1982); *Beck v. Alabama*, 447 U.S. 625, 637-38, 100 S. Ct. 2382, 2389-90 (1980). See also, Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 Harv. L. Rev. 355, 370, 397-401 nn.200-206 (1995) (collecting cases for this proposition).

3. Among the most important of these capital-specific rights are the right to exclude from jury service those jurors who are overly committed to capital punishment, see *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S. Ct. 844, 852 (1985) (establishing the currently-used test for whether a venireperson must be excused for cause on this basis), and the right to an individualized sentencing hearing where the defendant can present all mitigating evidence pertinent to "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 2964-65 (1978).

A. Statutory Death Eligibility

The primary way in which death is different for purposes of statutory death eligibility is that the Court has exercised stricter proportionality review than with non-death sentencing. The decisions in which the Court has done so are among the most well-known of the cases comprising the Court's capital jurisprudence. There are three main ways in which the Court has manifested its heightened concern with proportionality.

The first is with respect to the criminal offense for which death is a proportionate punishment. So far, the only crime for which the United States Supreme Court has found the death penalty to be a proportionate punishment is murder.⁴ Death has been found disproportionate for rape of an adult woman,⁵ kidnapping,⁶ and almost certainly, armed robbery.⁷ There remains the possibility that the Court might approve a death sentence for treason, or for rape of a juvenile.⁸ (Interestingly, Louisiana seems intent on testing the envelope as to death penalty for juvenile rape. The Louisiana Supreme Court held that a death sentence is not invariably disproportionate to that offense.⁹ No Louisiana case in which a death sentence for child rape has been imposed has made its way to the United States Supreme Court for resolution of the issue.) On the other hand, the Court exercises virtually no proportionality review as to the next most serious punishments, life imprisonment without possibility of parole ("LWOP"), and life imprisonment (with possibility of parole). The Court has upheld an LWOP sentence for the nonviolent crime of drug possession¹⁰ and a life sentence for a third offense nonviolent felony.¹¹ Thus,

4. See *Gregg v. Georgia*, 428 U.S. 153, 187, 96 S. Ct. 2909, 2932 (1976).

5. See *Coker v. Georgia*, 433 U.S. 584, 597-98, 97 S. Ct. 2861, 2868-69 (1977).

6. See *Eberheart v. Georgia*, 433 U.S. 917, 97 S. Ct. 2994 (1977).

7. See *Godfrey v. Georgia*, 446 U.S. 420, 453 (1980) (White, J., dissenting) (citing with approval the holding of the Georgia Supreme Court in *Gregg v. State*, 210 S.E.2d 659, 667 (1974), that a death sentence was unconstitutionally disproportionate to the crime of armed robbery. Although the United States Supreme Court has never expressly held a death sentence disproportionate to the crime of armed robbery, that is almost certainly because no state has tried to impose such a sentence in light of the fact that a death sentence has been held disproportionate to rape of an adult woman, which is a more serious crime.).

8. *Coker*, 433 U.S. at 597-98, 97 S. Ct. at 2868-69 (limiting holding to rape of an adult woman).

9. See *State v. Wilson*, 685 So. 2d 1063 (La. 1996) (noting that Louisiana was, at that time, then the only jurisdiction that authorized the death penalty for aggravated rape of a minor, and holding that the penalty was not disproportionate to the crime. *Id.* at 1068-70).

10. See *Harmelin v. Michigan*, 501 U.S. 957, 1001-05, 111 S. Ct. 2680, 2705-07 (1991) (Kennedy, J., concurring).

11. *Rummel v. Estelle*, 445 U.S. 263, 284-85, 100 S. Ct. 1133, 1144-45 (1980). *But see* *Solem v. Helm*, 463 U.S. 277, 296-300, 103 S. Ct. 3001, 3012-15 (1983) (distinguishing *Rummel* and holding that sentence of life without parole for a seventh nonviolent felony was disproportionate on facts of case).

it is unquestioned that LWOP is a constitutionally proportionate punishment for violent crimes such as murder, rape, and kidnapping.

The second way in which the Court exercises greater proportionality review of death sentences is by its requirement that only murders that by some rational criterion can be deemed to be more aggravated are death-eligible. Indeed, the primary motivating factor for the Court's entry into death penalty regulation in the first place, as manifested in *Furman v. Georgia*,¹² was its perception that the penalty was being inflicted arbitrarily and not via reasoned decisionmaking that limited its applicability to the "worst" cases.¹³ Thus, even though the Court has not been particularly vigilant in policing whether the aggravating circumstances¹⁴ chosen by state legislatures narrow the category of death eligibility enough,¹⁵ the Court has been insistent that states adopt *some* mechanism to distinguish more aggravated cases that are death eligible, from less aggravated ones that are not.¹⁶ Indeed, this aspect of proportionality animates much of the Court's significant death penalty precedents, including the age limit of sixteen on death eligibility,¹⁷ the exclusion of certain categories of retarded defendants from death eligibility,¹⁸ limitations on death eligibility for non-triggermen co-felons,¹⁹ the prohibition of a state manipulating degrees of homicide so as to

12. 408 U.S. 238, 92 S. Ct. 2726 (1972).

13. *Id.* at 309-10, 92 S. Ct. at 2762 (Stewart, J., concurring) ("For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.").

14. American capital punishment statutes fall into one of two structural categories. In some jurisdictions first degree murder is broadly defined and death-eligibility is determined at the penalty phase only if a listed statutory aggravating circumstance is proven by the prosecution. In other jurisdictions capital murder is defined as limited to certain specified categories of first degree murder, so that a finding of guilt is also a finding of death eligibility. Some jurisdictions partake of both of these structures, requiring a finding of a specified kind of first degree murder at the guilt/innocence phase and an additional finding of an aggravating circumstance at the penalty phase (although often these factors coincide or overlap). I will use the term "aggravating circumstance" broadly to cover the factors in either structure which elevate a defendant into the category of death eligibility.

15. See Steiker & Steiker, *supra* note 2, at 373-75 (commenting that despite the Court's jurisprudence, statutes still, "reflect[] the general failure of States to achieve any meaningful narrowing through the enumeration of aggravating circumstances.").

16. See *Tuilaepa v. California*, 512 U.S. 967, 971-72, 114 S. Ct. 2630, 2634-35 (1994) ("To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase [T]he circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder.").

17. See *Stanford v. Kentucky*, 492 U.S. 361, 370-74, 109 S. Ct. 2969, 2975-77 (1989) (death sentence may be proportionate for 16-year old); *but see* *Thompson v. Oklahoma*, 487 U.S. 815, 857-58, 108 S. Ct. 2687, 2710-11 (1988) (O'Connor, J., concurring) (but not for 15-year old).

18. *Penry v. Lynaugh*, 492 U.S. 302, 333, 109 S. Ct. 2934, 2954 (1989) (indicating in dictum that it would be unconstitutional to impose a death sentence on a defendant who is profoundly or severely retarded).

19. See *Tison v. Arizona*, 481 U.S. 137, 158, 107 S. Ct. 1676, 1688 (1987) (major participation

force jurors to return a death sentence,²⁰ and the Court's insistence that colorful, aggravating circumstances such as "heinous, atrocious and cruel" be narrowed so as to not arguably cover every wrongful homicide.²¹ The Court has exhibited no comparable proportionality concern with respect to LWOP—there is no reason to suspect that the Court would hold that LWOP is proportional to only the most serious first-degree murders, the most serious forcible rapes, etc.

Yet a third strain of the Court's concern for proportionality in capital cases is embodied in its rejection of mandatory death sentencing for any category of crime,²² including murder by a prisoner who is already under an LWOP sentence.²³ The Court's rationale is that if a death sentence is mandatory, it runs the risk of being disproportionate to the culpability of a particular offender within that category.²⁴ Again, the Court has exhibited no such proportionality concern with mandatory LWOP, and such a sentence has become commonplace in many jurisdictions for several serious violent felonies.²⁵

Obviously, if a defendant is sentenced to death on the basis of a constitutionally invalid death eligibility criterion, the error is automatically reversible and not subject to harmless error analysis. In the mid-to-late 1970's and early 1980's, quite a few defendants were sentenced under unconstitutional statutes, and gained reversal on that account.²⁶ But the era of significant litigation about the validity of statutory death eligibility criteria has passed. Legislators are by now well aware of the pitfalls to be avoided in drafting death penalty statutes. And, to the extent the legislators come up short, statutes can often be—and usually are—salvaged through the state courts' narrowing of interpretation so as to

in a felony combined with reckless indifference to human life must be shown before a non-triggerman co-felon can be sentenced to death).

20. See *Beck v. Alabama*, 447 U.S. 625, 642-43, 100 S. Ct. 2382, 2392-93 (1980) (striking down a statutory scheme which required jurors to convict and sentence without the benefit of lesser-included offense instructions which would fit the facts of the state).

21. See *infra* note 251.

22. See *Woodson v. North Carolina*, 428 U.S. 280, 302-05, 96 S. Ct. 2978, 2990-91 (1976) (striking down mandatory death sentencing scheme); *Roberts v. Louisiana*, 428 U.S. 325, 331-34, 96 S. Ct. 3001, 3005-06 (1976) (to same effect).

23. See *Sumner v. Shuman*, 483 U.S. 66, 77-78, 107 S. Ct. 2716, 2723 (1987).

24. See *Woodson*, 428 U.S. at 304, 96 S. Ct. at 2991 ("[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.").

25. For example, I reside in Iowa where LWOP is mandatory for first degree murder (see Iowa Code §§ 707.2 & 902.1 (1996); first degree sexual assaults (see Iowa Code §§ 709.2 & 902.1 (1996); and first degree kidnapping (see Iowa Code §§ 710.2 & 902.1 (1996)).

26. The decision in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726 (1972) alone resulted in the commutation of at least 558 death sentences. See James W. Marquart & Jonathan R. Sorensen, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society From Capital Offenders*, 23 Loy. L.A. L. Rev. 5, 14 (1989) ("According to our data there were 558 inmates (excluding Illinois) on death row awaiting execution in 1972 who were commuted as a result of *Furman*.").

render them constitutional.²⁷ Thus, virtually every defendant who has received a death sentence in recent years is unquestionably within the category of those who are statutorily death-eligible.²⁸ To examine harmless error jurisprudence in the context of death penalty cases, then, we will have to look further.

B. The Penalty Phase

1. Ways of Thinking About How the "Death-Is-Different Principle" Could Support According Additional Rights to Capital Defendants

The Court's focus on the constitutional significance of the penalty phase has been clear since *Gregg*.²⁹ The Court's clearest statement of this focus is probably the following from the 1983 case *California v. Ramos*:³⁰

[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the *capital sentencing determination*. In ensuring that the death penalty is not meted out arbitrarily or capriciously, the Court's principal concern has been more with the *procedure* by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death, *once it has been determined that the defendant falls within the category of persons eligible for the death penalty*.³¹

But this focus on the penalty phase can support several ways of thinking about how the Court's perception that death is different could be implemented in terms of bestowing additional rights on capital defendants relating to sentencing. The most wide-ranging (and defendant-favorable) view would be that capital defendants should have additional rights at every stage of the proceeding in order to secure the reliability of death sentences. This could mean, for example, that in order to admit a confession in either phase of a capital case the state should have to prove not just by a preponderance of the evidence that

27. *Arave v. Creech*, 507 U.S. 463, 471, 113 S. Ct. 1534, 1541 (1993) (Idaho's aggravating circumstance that the defendant exhibited "utter disregard for human life" was saved from unconstitutional ambiguity by the state supreme court's narrowing interpretation); *Walton v. Arizona*, 497 U.S. 639, 654-55, 110 S. Ct. 3047, 3057-58 (1990) (Arizona's aggravating circumstance of "especially heinous, cruel or depraved" was saved from unconstitutional ambiguity by a state supreme court narrowing interpretation).

28. *But see Dugar v. State*, 615 So. 2d 1333 (La. 1993) (setting aside death sentence of fifteen-year old defendant imposed in violation of sixteen-year old minimum set by United States Supreme Court in *Thompson v. Oklahoma*, 487 U.S. 815, 857-58, 108 S. Ct. 2687, 2710-11 (1988) (O'Connor, J., concurring)).

29. 428 U.S. 153, 96 S. Ct. 2909 (1976).

30. 463 U.S. 992, 103 S. Ct. 3446 (1983).

31. *Id.* at 998-99, 103 S. Ct. at 3452 (emphasis added).

the confession was voluntary, as would be true in a non-capital case,³² but by some higher standard like clear-and-convincing evidence or beyond a reasonable doubt. It could also mean that capital defendants should be entitled to super-competent counsel. The list of possible additional rights could be a long one. But the Court has never given any indication that it subscribes to this wide-ranging view.

At the other end of the spectrum would be the view that the penalty phase is simply a chronologically distinct segment of the case (which actually occurs in two sub-segments—voir dire and the penalty phase proper). Thinking of the penalty phase in this way leads to the conclusion that any additional rights accorded a defendant should be limited to those two sub-segments. The Court's penalty phase jurisprudence largely conforms to this view, but there is one important precedent demonstrating that the Court's view is probably not so constricted.

That precedent is the 1985 decision in *Ake v. Oklahoma*.³³ There, a capital defendant who exhibited clear signs of insanity from the time of his capture was denied funds with which to hire a psychiatrist to perform an evaluation, which would have been relevant at the stages of competency to stand trial, as to an insanity defense at the guilt/innocence phase, and as to the penalty phase should he be convicted.³⁴ The Court held in *Ake's* favor, in part because the psychiatrist's evidence would have conduced to a more reliable result at the penalty phase:

Without a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view [regarding the prosecution's claim of future dangerousness], and thereby loses a significant opportunity to raise in the jurors' minds questions about the State's proof of an aggravating factor. In such a circumstance, where the consequence of error is so great, the relevance of responsive psychiatrist's testimony so evident, and the burden on the State so slim, due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase.³⁵

The Court's imposition of the requirement of state-funded expert assistance to prepare for the penalty phase thus shows that the Court has adopted the more moderate and commonsensical view of the penalty phase, not as a time-bound chronological segment, but as the culmination of a process.

This conception of the penalty phase as the culmination of a process could plausibly be expanded to support a significantly broader vision of additional

32. See *Colorado v. Connelly*, 479 U.S. 157, 168, 107 S. Ct. 515, 522 (1986); *Lego v. Twomey*, 404 U.S. 477, 488, 92 S. Ct. 619, 626 (1972).

33. 470 U.S. 68, 105 S. Ct. 1087 (1985).

34. *Id.* at 72, 105 S. Ct. at 1090-91.

35. *Id.* at 84, 105 S. Ct. at 1097.

rights to be accorded to capital defendants. A court adopting this conception could accord additional rights as to matters occurring at *any point* in the process that might affect the penalty proceeding. One likely set of candidates for additional rights would consist of *pretrial* issues, such as the amount of time the defendant was given to prepare for the penalty phase, change of venue, discovery required of the prosecution, etc. Another candidate would be the guilt/innocence phase, as for example, creating stricter rules for admission of evidence with a high potential for unfair prejudice such as gruesome photos or other-crimes evidence at the guilt/innocence phase when it might unfairly prejudice the defendant as to the penalty phase. At least one lower state court has interpreted the Court's precedents as establishing a broad version of this culmination-of-the-process view:

The connecting thread running through the Supreme Court's decisions applying heightened scrutiny in capital cases is that the Eighth Amendment requires that a higher level of scrutiny be applied at any stage of a capital case that directly affects the sentencing determination: a heightened standard of reliability is required in determining that death is the appropriate punishment, whenever that determination is being made. This may require additional safeguards at various times during a capital proceeding. . . .³⁶

This court is almost certainly giving too expansive a reading to the Supreme Court's precedents. *Ake* is the only precedent that shows any focus by the Court outside the penalty phase proper and voir dire. Thus, it seems likely that the Court holds a very limited culmination-of-the-process view, perhaps limited to funds necessary to enable the defendant to effectively present mitigating evidence.

I believe that although the lower state court quoted above has given too expansive a reading to Supreme Court precedents, the lower court's view is in fact the one that best implements the death-is-different principle, both as a matter

36. *People v. Arthur*, 673 N.Y.S.2d 486, 493-94 (Sup. Ct. N.Y. Co. 1997). There has been a spate of recent litigation under the relatively new New York death penalty statute about pretrial rights of capital defendants. In New York, apparently capital defendants have not yet reconciled themselves to the fact that death is not different, except for voir dire and the penalty phase. Defendants have contended that a "heightened due process" requirement applies to all aspects of a capital case, including pretrial issues. Almost every court in New York has held that a capital defendant is not entitled to "heightened due process" at the grand jury stage, in discovery, or in any pretrial matter. *See, e.g., People v. Arroyo*, Ind. No. 97-13, slip op. (Co. Ct. Schoharie Co. Aug. 27, 1997) (heightened due process not applicable at grand jury stage); *People v. Shulman*, 658 N.Y.S.2d 794 (Co. Ct. Suffolk Co. 1997); *People v. Bastien*, 649 N.Y.S.2d 979, 980 (Sup. Ct. N.Y. Co. 1996) (heightened due process applies only after conviction for capital offense); and *People v. Rodriguez*, 647 N.Y.S.2d 350 (Sup. Ct. N.Y. Co. 1996) (heightened due process applicable at sentencing phase only)). *See also People v. Arthur*, 673 N.Y.S.2d 486, 495 n.7 (Sup. Ct. N.Y. Co. 1997) (collecting other New York trial court decisions to the same effect that are not reported in the National Reporter System).

of vindicating the Supreme Court's original rationale for entering the death penalty fray, and as a matter of fairness. Beginning from the premises that (1) an error in death sentencing is worse than any other kind of mistake anywhere in the criminal process, (2) a capital defendant has a right to present broad-ranging mitigating evidence, and (3) that mitigating evidence has to be developed during a time and labor-intensive process, it is hard to see how any view other than a broad version of the culmination-of-the-process view makes much sense.

In particular, there are three additional rights a capital defendant needs to prepare the best possible penalty phase case: (1) sufficient time; (2) funds for expert assistance, especially including for a "mitigation expert"; and (3) a super-competent lawyer, i.e., one who knows how to defend in a penalty phase. So far as I could tell from reading a flock of Louisiana Supreme Court death penalty appellate decisions, capital defendants are not being rushed to trial. Whether they are in other states I cannot determine, but I will proceed on the assumption that no United States Supreme Court intervention is necessary to force states to give capital defendants sufficient time. Mitigation experts and super-competent lawyers, though, are another matter.

A mitigation expert is a professional (usually a highly-credentialed social scientist) who conducts an intensive investigation into a capital defendant's background to find mitigating evidence.³⁷ Usually there is plenty of it, if one knows where to look.³⁸ A mitigation expert can often identify other expert assistance that is needed. The services of such an expert are essential for any capital defendant.³⁹ Yet the constitutional right of a capital defendant to funds for such an expert is far from a settled proposition. The United States Supreme Court has never opined on the issue, and lower court precedent is spotty.⁴⁰ Surprisingly, I found not one mention in the six-year sample of Louisiana Supreme Court cases I studied of mitigation experts, although some specialized experts were mentioned.

As to super-competent counsel, this would be the one best antidote to counteract the poison of error in capital cases. Highly skilled defense lawyers, rather than proliferating error, should decrease the quantity of error—assuming a competent trial judge is presiding—because skilled lawyers object to errors as

37. See Jonathan P. Tomes, *Damned If You Do, Damned If You Don't: The Use of Mitigation Experts in Death Penalty Litigation*, 24 Am. J. Crim. L. 359, 360 (1997) (explaining mitigation experts).

38. See, e.g., Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 Santa Clara L. Rev. 547, 600-01 (1995) ("Many capital defendants have led lives that are the criminogenic equivalent of being born into hazardous waste dumps—Love Canals of crime—being exposed to crime-producing carcinogens since birth, breathing the social and psychological equivalents of smog-invested air through most of their young lives and into adulthood.").

39. See Tomes, *supra* note 37, at 360 (mitigation experts fill the gap that often exists because "lawyers or even their investigators are not necessarily trained or competent to find, assess, and present such [mitigating] evidence.").

40. For a round-up of the sparse case law on this point see *id.* at 373-77.

they occur so that a trial judge has time to cure them. And, even more importantly, it seems beyond cavil that basic fairness demands that a defendant on trial for his life have highly skilled legal assistance. Yet the United States Supreme Court has never accorded a capital defendant the right to a better-than-barely-adequate lawyer. This is, I believe, the gravest error anywhere in the Court's capital jurisprudence. I will explore this proposition later in the Article.⁴¹

2. *The Basics of the Penalty Phase*

The Supreme Court has never held that the by-now traditional two-part capital case trial system of a guilt/innocence phase, followed by a penalty phase if the fact finder finds guilt, is the *only* constitutionally acceptable way a state could structure its death penalty system.⁴² But ever since the Court upheld the constitutionality of such a system in *Gregg*, all states have used this safe harbor in constructing their systems.

The penalty phase of a capital case is a proceeding unique in American law. Most obviously, death is penalty unlike any other.⁴³ An additional aspect of uniqueness is that most death penalty jurisdictions designate the jury as the sentencer, while jury sentencing in noncapital cases is limited to handful of Southern states.⁴⁴ These two unique factors have prompted most of the rest of the Court's death penalty jurisprudence that was not already accounted for above in discussion of statutory death eligibility.

The key precedent implementing the *Ramos* focus on the penalty phase is the 1978 case of *Lockett v. Ohio*,⁴⁵ where the Court held that a sentencer is obligated to consider mitigating evidence the defendant offers concerning "any aspect of a defendant's character or record and any of the circumstances of the

41. See *infra* notes 282-293 and accompanying text.

42. See *Gregg v. Georgia*, 428 U.S. 153, 190-91, 96 S. Ct. 2909, 2933 (1976) (court noted that "Those who have studied the question suggest that a bifurcated procedure—one in which the question of sentence is not considered until the determination of guilt has been made—is the best answer." The court then went on to say, however, "We do not intend to suggest that only the above-described procedures [primarily the bifurcated procedure] would be permissible under *Furman*. . . ."). *Id.* at 195, 96 S. Ct. at 2935.

43. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 306, 92 S. Ct. 2726, 2760 (Stewart, J. concurring) ("The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.").

44. See Robert A. Weninger, *Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas*, 45 Wash. U. J. Urb. & Contemp. L. 3, 3-4 (1994) ("Only eight American states, chiefly in the south, [Arkansas, Kentucky, Mississippi, Missouri, Oklahoma, Tennessee, Texas and Virginia] provide statutory frameworks allowing the jury to determine sentences in noncapital cases.").

45. 438 U.S. 586, 98 S. Ct. 2954 (1978).

offense that the defendant proffers as a basis for a sentence less than death."⁴⁶ This principle gives defendants wide latitude to present many kinds of evidence they believe to be mitigating, from childhood brain trauma, to good works done by the defendant, to the fact that the defendant has been a good prisoner while awaiting the penalty phase.⁴⁷

The *Lockett* principle not only dictates what information defendants must be permitted to present; it also leads to important voir dire precepts applicable to jury-sentencing jurisdictions. While not occurring chronologically during the penalty phase, voir dire in capital cases should really be viewed as a part thereof. Few things are more important to the parties in a capital case than finding jurors who will react the way the parties desire in the penalty phase decision. Recognizing this, the Court has promulgated crucial precedents defining juror eligibility in capital cases.

Both sides in a criminal case are entitled to try the issue of guilt or innocence before jurors who are willing to follow the law as per the trial court's instructions.⁴⁸ Thus, the prosecution has a right to have stricken for cause a prospective juror who is unwilling to convict if all of the requisites for conviction are met by the required standard of proof.⁴⁹ Similarly, the defense has a right to have stricken for cause any prospective juror who is unwilling to acquit if the prosecution fails to prove a requisite fact.⁵⁰ This willingness to follow the law as to the guilt/innocence determination is usually all that is required of jurors since, in most cases, only the guilt/innocence issue is presented to the jury for a decision, with the sentencing authority residing in the trial judge.

But in many death penalty jurisdictions,⁵¹ including Louisiana,⁵² the jury is the capital sentencer. This means that the same requirement of willingness to follow the law applies in a capital sentencing. But what it means to "follow the law" as to a capital sentencing determination is less easily defined than with

46. *Id.* at 604, 98 S. Ct. at 2965.

47. *Simmons v. South Carolina*, 512 U.S. 154, 177, 114 S. Ct. 2187 (1994) (holding it error where the prosecution has raised the issue of future dangerousness to prevent the defendant from showing his record of good conduct in prison).

48. See 50A C.J.S. *Juries* § 405 (1997) ("A juror who cannot or will not follow the applicable law is incompetent and subject to challenge.").

49. See, e.g., Tex. Code Crim. P. Ann. art. 35.16(b)(3) (providing that the prosecution has a right to challenge for cause a juror who "has a bias or a prejudice against any phase of law upon which the state is entitled to rely for conviction or punishment.").

50. See, e.g., Tex. Code Crim. P. Ann. art. 35.16(c)(2) (providing that the defendant may challenge for cause a juror who has "bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely, either as a defense to some phase of the offense for which the defendant is being prosecuted or as a mitigation therefore or of the punishment therefore.").

51. In twenty-eight of the thirty-eight death penalty jurisdictions the jury is the sentencer. For a listing of these jurisdictions and their applicable statutes, see David McCord, *Judging the Effectiveness of the Supreme Court's Death Penalty Jurisprudence According to the Court's Own Goals: Mild Success or Major Disaster*, 24 Fla. St. U. L. Rev. 545, 561-62 & n.83 (1997).

52. See La. Const. art. I, § 17; and La. Code Crim. P. art. 905.6.

respect to a guilt/innocence determination. As to a guilt/innocence decision, a jury's duty is clear once it has determined the facts and applied the law to those facts: if the prosecution has sufficiently proven all the required elements then the jury must convict, while if the prosecution has failed the jury must acquit.⁵³ By contrast, in a capital sentencing determination a jury is *never* required by law to impose a death sentence. The Supreme Court has established this proposition through the twin holdings that mandatory death sentences are unconstitutional,⁵⁴ and the requirement that jurors are always obligated to consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."⁵⁵ Accordingly, what it means for a prospective juror to be willing to "follow the law" with respect to a capital sentencing determination has been held by the Supreme Court to mean two things.

First, the juror must not be so morally opposed to capital punishment as to effectively be unable to render a death verdict no matter how horrific the aggravating circumstances proven by the prosecution. The current test that an anti-capital punishment leaning prospective juror must pass is set forth in *Wainwright v. Witt*,⁵⁶ which I will refer to as the "*Witt* precept": the juror's anti-capital punishment views must be such that they would not "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."⁵⁷ The standard does not require that a juror's bias be proved with "unmistakable clarity";⁵⁸ such a juror can properly be challenged for cause "where the trial judge is left with the definite impression that a perspective juror would be unable to faithfully and impartially apply the law."⁵⁹

The second precept of what it means for a juror to be willing to "follow the law" in a death sentencing determination is that the juror must not be so pro-

53. Of course, jurors have the power to nullify the law. If jurors nullify in the sense of acquitting even though they believe the prosecution has proven its case beyond a reasonable doubt, jurors will "get away" with the nullification because the prosecution has no right to appeal an acquittal, since if it won on appeal, a retrial would violate the double jeopardy clause. On the other hand, jurors can nullify by convicting even though they believe the prosecution has failed to prove its case and can usually "get away" with this as well, because of the stringent rules against using what went on in the jury room in any post verdict proceeding to set aside the judgment. See, e.g., Fed. R. Evid. 606(b) (permitting a juror to testify after the fact only concerning "whether extraneous prejudicial information was improperly brought to the jury's attention, or whether any outside influence was improperly brought to bear upon any juror."). But just because jurors have the power to nullify the law does not mean they have the *right* to do so.

54. See *Woodson v. North Carolina*, 428 U.S. 280, 302-05, 96 S. Ct. 2978, 2990-92 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 331-34, 96 S. Ct. 3001, 3005-06 (1976).

55. *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 2965 (1978).

56. 469 U.S. 412, 105 S. Ct. 844 (1985).

57. *Id.* at 424, 105 S. Ct. at 852 (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S. Ct. 2521, 2526 (1980)).

58. *Witt*, 469 U.S. at 424, 105 S. Ct. at 852.

59. *Id.* at 425-26, 105 S. Ct. at 853.

death penalty that the juror would be effectively unable *not* to impose a death sentence on a given set of facts. This point was established in *Morgan v. Illinois*,⁶⁰ and I will refer to it as the "*Morgan* precept." A corollary of the *Morgan* precept is that a juror must always be willing to consider relevant mitigating evidence offered by the defendant.⁶¹ In *Morgan*, the trial court refused to allow defense counsel to voir dire prospective jurors with the question, "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?"⁶² The Supreme Court held that it was reversible error to prevent defense counsel from conducting voir dire on this point, reasoning that "a juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do."⁶³ The Supreme Court then went on to draw the inescapable conclusion that, "If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence."⁶⁴

Before proceeding to analyze the Court's harmless error jurisprudence, it should be noted that there is no necessary connection between the issue of *whether* to accord a capital defendant additional rights, discussed in a preceding subpart,⁶⁵ and the issue of what *standard* should be used to judge claims of error for violations of such a defendant's rights. Various combinations are possible in theory. For example, taking the death-is-different principle to its full extreme in favor of defendants would mean arguing that not only should a capital defendant be entitled to more rights at the penalty phase, but that an error in any aspect of the case should be automatically reversible. A more moderate combination would hold that only rights specially accorded to capital defendants are important enough to be automatically reversible. A prosecution-favorable combination would assert that even though a capital defendant is accorded additional rights, that does not mean that any rights should be construed to mandate automatic reversal if they are violated. As we will see below, the Court's position most closely corresponds to the latter.

C. Preliminary Note: On Marching in Lockstep Versus Marching to a Different Drummer

Having now seen how the Court has established the constitutional structure of death sentencing: parameters for statutory death eligibility, and a penalty phase at which the defendant has a right to present broad-ranging mitigation evidence to a (hopefully) relatively open-minded sentencer, it is now time to turn

60. 504 U.S. 719, 112 S. Ct. 2222 (1992).

61. *Id.* at 729, 112 S. Ct. at 2229-30.

62. *Id.* at 723, 112 S. Ct. at 2226.

63. *Id.* at 729, 112 S. Ct. at 2229.

64. *Id.*, 112 S. Ct. at 2230.

65. See *supra* notes 31-36 and accompanying text.

to the basic tenets of the Court's harmless error jurisprudence. But first, it is important to examine the extent to which state courts are required to follow United States Supreme Court precedents under the Eighth Amendment.

States cannot accord criminal defendants *less* expansive federal constitutional rights than those set forth by the United States Supreme Court, but states are free to accord *more* expansive rights under state law.⁶⁶ Often, state courts simply piggyback on United States Supreme Court modes of analysis in dealing with federal constitutional claims of error. This is known colloquially as the "lockstep" approach.⁶⁷ But with some regularity state courts do accord defendants additional protections under either state constitutional provisions that have no analogs in the federal Constitution, or by construing provisions of state constitutions to accord greater protections than the cognate provisions of the federal Constitution.⁶⁸ Thus, throughout this Article I will point out important issues as to which the Louisiana Supreme Court has marched in lockstep, and other important issues as to which it has marched to its own drummer.⁶⁹

III. THE CONTOURS OF UNITED STATES SUPREME COURT HARMLESS ERROR JURISPRUDENCE

A. *Explicit Harmless Error Doctrine*

Harmless error jurisprudence is complicated by the fact that two important categories of claims of error—one of which is unique to capital cases (ambiguous or unsupported aggravating factors), and the other of which arises frequently in capital cases (ineffective assistance of counsel)—that could be analyzed using harmless error terminology, have instead been consigned by the Supreme Court to their own special bodies of law in which the term "harmless error" is not the currency for discussion. In this subpart, I will explain Supreme Court jurisprudence where the Court *has* specifically used the term "harmless error."

66. Barry Latzer, *State Constitutions and Criminal Justice* 4 (1991) ("A construction analogy is usually drawn to illustrate this principle. The federal Constitution is said to provide a rights 'floor' below which no state law can go. But the states remain free to erect a 'ceiling' raising state rights above the federal floor.").

67. See, e.g., *State v. Ferrier*, 960 P.2d 927, 931 (Wash. 1998) ("Because we had not yet spoken on whether a separate state constitutional analysis for voluntary consent applied . . . [the lower court] concluded that we were in lockstep with the federal rule on this issue."); Robert F. Williams, *New Mexico State Constitutional Law Comes of Age*, 28 N.M. L. Rev. 379, 272 (1988) ("And while debate rages about the extent to which state constitutional provisions involving rights ought to be interpreted independently of, or in lockstep with, equivalent federal provisions, the basic approaches we use in addressing the question are drawn from traditions of national constitutionalism and national constitutional theory.").

68. Barry Latzer, *State Constitutional Criminal Law* 1-2 (1995) ("A significant minority of these state constitutional cases provide broader rights than have been granted as a matter of federal constitutional law. The preponderance of the case law, however, adopts federal constitutional standards in the construction of the state provisions.").

69. See *infra* notes 117-119, 189, 207-219, 227-228 and accompanying text.

I will refer to this category as "explicit" harmless error doctrine. Then elsewhere in the Article, I will explain the two important categories where harmless error is assessed without using the rubric of "harmless error," but which nonetheless raise the same issues in judging the severity of the error.⁷⁰ I will refer to these as "camouflaged" harmless error doctrines.

1. The Starting Point: Chapman v. California

While it is possible to trace the history of harmless error jurisprudence beyond the 1967 case of *Chapman v. California*,⁷¹ for purposes of this Article beginning with *Chapman* will be sufficient, because all current Supreme Court explicit harmless error doctrine derives from it. *Chapman* is important for three principles it established. First, prior to *Chapman*, it was unclear whether a federal constitutional error in a criminal case could ever be harmless.⁷² The Court in *Chapman* announced that some such errors could be deemed harmless.⁷³ Put differently, the Court decided that the fact that an error is "constitutional" does not in and of itself make that error immune from harmless error analysis. Second, while recognizing that some claims of constitutional error were subject to harmless error analysis, the Court also made clear that some kinds of constitutional error were so fundamental as to defy harmless error analysis and to thus be automatically reversible.⁷⁴ The Court retrospectively characterized three such errors from its prior jurisprudence: admission into evidence of a coerced confession,⁷⁵ deprivation of right to counsel at trial,⁷⁶ and trial before a judge lacking impartiality.⁷⁷ The Supreme Court's continuing quest to determine which constitutional errors are subject to harmless error analysis will be further described in subpart 2, below.

The third important aspect of *Chapman* is that it established a test for determining whether an error that is subject to harmless error analysis was in fact harmless: "Before a federal constitutional error can be held harmless, the Court

70. See *infra* notes 280-293 and accompanying text.

71. 386 U.S. 18, 87 S. Ct. 824 (1967). For a discussion of the law prior to *Chapman*, see David McCord, *The "Trial"/"Structural" Error Dichotomy: Erroneous, and Not Harmless*, 45 U. Kan. L. Rev. 1401, 1403-04 (1997) (tracing that history).

72. See *Kotteakos v. United States*, 328 U.S. 750, 764-65, 66 S. Ct. 1239, 1248 (1946) (speculating in dictum that harmless error analysis "perhaps" would not apply "where the departure is from a constitutional norm").

73. *Chapman*, 386 U.S. at 22, 87 S. Ct. at 827.

74. *Id.* at 23, 87 S. Ct. at 827-28.

75. See *id.* at 23 n.8, 87 S. Ct. at 828 n.8 (citing *Payne v. Arkansas*, 356 U.S. 560, 567-68, 78 S. Ct. 844, 850 (1958)).

76. See *Chapman*, 386 U.S. at 23 n.8, 87 S. Ct. at 828 n.8 (citing *Gideon v. Wainwright*, 372 U.S. 335, 344-45, 83 S. Ct. 792, 796-97 (1963)).

77. See *Chapman*, 386 U.S. at 23 n.8, 87 S. Ct. at 828 n.8 (citing *Tumey v. Ohio*, 273 U.S. 510, 522, 47 S. Ct. 437, 440 (1927)).

must be able to declare a belief that it was harmless beyond a reasonable doubt."⁷⁸ This test does two things. First, it allocates the burden of persuasion to the prosecution to convince the appellate court of the harmlessness of the error, rather than on the convicted defendant to show that the error was harmful. Second, it places the burden on the prosecution at a high level, i.e., beyond a reasonable doubt. The Supreme Court has, however, wavered over time whether this is the proper test. The Court's struggle with the issue of the proper test to use for harmlessness is further explained in subpart 3, below.

2. The "Structural Defect"/"Trial Error" Dichotomy

In the quarter century following *Chapman* the Supreme Court found only a handful of constitutional errors that were so fundamental as to be automatically reversible.⁷⁹ The Court formulated no test for recognizing such fundamental defects, but rather proceeded on a "know it when we see it" basis. In the 1991 case of *Arizona v. Fulminante*,⁸⁰ though, while reaffirming the *Chapman* principle that there are some errors so fundamental as to be automatically reversible, which the Court denominated "structural defects,"⁸¹ the Court attempted to establish a test for recognizing such errors. What prompted the Court to undertake this formulation was its conclusion that one of the examples *Chapman* had specified of an automatically reversible error—admission of a coerced confession—was in fact "trial error" that should be subject to harmless error analysis.⁸² As I have argued elsewhere,⁸³ the Court ended up propounding three separate, ambiguous and partly overlapping, yet partially inconsistent, definitions of "structural defects" that are automatically reversible.⁸⁴ The

78. *Chapman*, 386 U.S. at 24, 87 S. Ct. at 828.

79. See *Young v. United States*, 481 U.S. 787, 809-14, 107 S. Ct. 2124, 2138-41 (1987) (appointment of an interested party's attorney as prosecutor for contempt charges); *Gray v. Mississippi*, 481 U.S. 648, 668, 107 S. Ct. 2045, 2056 (1987) (seating a juror in a capital case who is unconstitutionally predisposed toward a death sentence when the defendant has exhausted all peremptory challenges); *Vasquez v. Hillery*, 474 U.S. 254, 263-64, 106 S. Ct. 617, 623-24 (1986) (unlawful exclusion of members of the defendant's race from a grand jury); *Waller v. Georgia*, 467 U.S. 39, 48-50 & n.9, 104 S. Ct. 2210, 2216-17 & n.9 (1984) (abridgment of the right to a public trial); and *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8, 104 S. Ct. 944, 950 n.8 (1984) (abridgment of the right to self-representation).

80. 499 U.S. 279, 111 S. Ct. 1246 (1991).

81. *Id.* at 310, 111 S. Ct. at 1265.

82. *Id.*

83. See McCord, *supra* note 71, at 1412-16.

84. See *id.* (identifying the narrowest definition of "trial error" as that which may be "quantitatively assessed in the context of other evidence" (quoting *Fulminante*, 499 U.S. at 307-308, 111 S. Ct. at 1263-64); a second "durational" definition as error that occurred "during the presentation of the case to the jury" (quoting *Fulminante*, 499 U.S. at 307, 111 S. Ct. at 1264); and a third, even broader definition, as anything that does not "affect the framework within which the trial proceeds, rather than simply an error in the trial process itself" (quoting *Fulminante*, 499 U.S. at 310, 111 S. Ct. at 1265)).

shortcomings of the "structural defect"/"trial error" dichotomy are not, however, the topic of this Article. For my purposes here it will suffice to note one thing: the Court has rejected the idea that every constitutional error in a death penalty case is "structural."⁸⁵ While it would have been coherent for the Court to reason that because "death is different,"⁸⁶ any constitutional error in a death penalty case should be automatically reversible, the Court has instead opted to focus on how fundamental the error is, rather than on the nature of the case in which the error occurred. Thus, the only error peculiar to capital cases that the Court has definitely found to be automatically reversible (although the Court did not call it "structural") is the impaneling of a juror who violates the *Morgan* precept by being too pro-capital punishment.⁸⁷ This result is not surprising because that error is of the same cloth as one of the errors denominated as automatically reversible in *Chapman*, and acknowledged to be so in *Fulminante*: trial before a biased tribunal.⁸⁸ There is one additional capital-case-specific issue that the Court at one point seemed to have declared automatically reversible—improperly excusing for cause an anti-capital punishment venireperson who nonetheless passed the *Witt* test—but later seemingly removed from the category of automatic reversibility except in the most unusual of circumstances.⁸⁹ I will discuss this turnabout later in the Article.⁹⁰

Despite the defects of *Fulminante*, the Court has used the dichotomy between "structural defects" and "trial errors" in two subsequent cases⁹¹ and does not seem likely to repudiate the dichotomy anytime soon. In any event, because so few errors are "structural defects," the importance of the dichotomy pales in comparison with the significance of the issue discussed in the next subpart: the proper standard for assessing the harmfulness of "trial error."

The Louisiana Supreme Court has not had much to say about claims of structural error, either in general or in death penalty cases. In fact, the only death penalty decisions where the court has even used the term involved the very

85. *Fulminante* itself was a case in which the defendant was death sentenced. See *Fulminante*, 499 U.S. at 284, 111 S. Ct. at 1251. The Court gave no indication that the dichotomy it was formulating was in any way dependent upon the status of the case as a capital one. See also *Sullivan v. Louisiana*, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 2082-83 (1993) (Court uses dichotomy in a capital case); and *Brecht v. Abrahamson*, 507 U.S. 619, 629-30, 113 S. Ct. 1710, 1717 (1993) (Court applies the dichotomy in a non-capital case).

86. See *Steiker & Steiker*, *supra* note 2, at 397-401 nn.200-206 (collecting the numerous cases in which the Supreme Court has opined that "death is different").

87. *Morgan v. Illinois*, 504 U.S. 719, 729, 112 S. Ct. 2222, 2229 (1992).

88. *Chapman v. California*, 386 U.S. 18, 23 n.8, 87 S. Ct. 824, 828 n.8 (1967) (citing *Tumey v. Ohio*, 273 U.S. 510, 522, 47 S. Ct. 437, 440-41 (1927)); *Arizona v. Fulminante*, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 1264-65 (1991).

89. See *Ross v. Oklahoma*, 487 U.S. 81, 87-88, 108 S. Ct. 2273, 2277-78 (1988), possibly overruling *Gray v. Mississippi*, 481 U.S. 648, 668, 107 S. Ct. 2045, 2057 (1987).

90. See *infra* notes 167-183 and accompanying text.

91. See *Sullivan v. Louisiana*, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 2082-83 (1993); *Brecht v. Abrahamson*, 507 U.S. 619, 629-30, 113 S. Ct. 1710, 1717-18 (1993).

case that helped establish the principle that an erroneous reasonable doubt instruction is structural error.⁹²

3. Standards for Assessing the Harmfulness of "Trial Error"

Given the Supreme Court's position that "most constitutional errors can be harmless,"⁹³ the most significant question for harmless error doctrine is what test should be used by a court to distinguish between harmless and reversible error. Such a test must address two issues. First, on which party should the burden be cast—on the prosecution to prove harmlessness, or on the defendant to prove harmfulness? The *Chapman* Court indicated that this burden must be borne by the prosecution.⁹⁴ The second issue that such a test must address is by what standard of persuasion must the prosecution show that the error was harmless? The *Chapman* Court answered that the standard must be the high one of beyond a reasonable doubt.⁹⁵ But a mere two years after *Chapman*, in *Harrington v. California*,⁹⁶ the Court upheld a conviction despite a constitutional error because it found evidence against the defendant to be "overwhelming."⁹⁷ The Court did not acknowledge that it was departing from the *Chapman* test.⁹⁸ But clearly, the *Harrington* standard is considerably more favorable to the prosecution because it permits the prosecution to prevail on appeal, even in

92. The litigation saga of Tommy Cage began in earnest when the United States Supreme Court held that the jury instruction regarding reasonable doubt given in his death penalty case in Louisiana was unconstitutional. See *Cage v. Louisiana*, 498 U.S. 39, 41, 111 S. Ct. 328, 329 (1990). The Supreme Court did not decide at that juncture whether the error could be harmless. The case having been returned to the Louisiana court system, the Louisiana Supreme Court then held that the erroneous reasonable doubt instruction was a "trial error" subject to harmless error analysis that had in fact been harmless. See *State v. Cage*, 583 So. 2d 1125, 1127-29 (La. 1991). Cage sought certiorari review of this decision by the United States Supreme Court, but the Court denied the petition. See *Cage*, 502 U.S. at 874, 112 S. Ct. at 211. But then, in another Louisiana death penalty case where an identical instruction had been given, the Court found in *Sullivan v. Louisiana* that the error was a "structural defect" not subject to harmless error analysis. 508 U.S. 275, 280, 113 S. Ct. 2078, 2082 (1993). Cage then petitioned the Louisiana Supreme Court for an "out of time" rehearing of the earlier state court decision holding the error in his case to have been harmless. See *Cage*, 637 So. 2d at 90. The Louisiana Supreme Court held that its rules did not permit an out of time rehearing, but remanded the case to the lower courts to be treated as a postconviction remedy petition. *Id.* at 90. Finally, in *State ex rel. Tommy Cage*, 667 So. 2d 519, 520 (La. 1996), the Louisiana Supreme Court held that both Cage's conviction and sentence had to be reversed because of the error in the reasonable doubt jury instruction.

93. *Arizona v. Fulminante*, 499 U.S. 279, 306, 111 S. Ct. 1246, 1263 (1991).

94. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967).

95. *Id.*

96. 395 U.S. 250, 89 S. Ct. 1726 (1969).

97. *Id.* at 254, 89 S. Ct. at 1729.

98. *Id.* (Court equated the overwhelming evidence test with the *Chapman* test). But one recent commentator argues that while courts still pay lip service to *Chapman*, *Harrington* has actually replaced it as the governing standard. See Charles S. Chapel, *The Irony of Harmless Error*, 51 Okla. L. Rev. 501, 525 (1998).

the face of error that might have affected the verdict, if the evidence against the defendant is nonetheless overwhelming.

For the next seventeen years the Court continued to vacillate between the *Chapman* and *Harrington* tests without ever explaining why it chose one test in one context and the other in another.⁹⁹ Then, to complicate things even further, in the 1986 case of *Delaware v. Van Arsdall*,¹⁰⁰ the Court seemed to create a hybrid balancing test in the context of erroneously admitted evidence by requiring that the reviewing court compare the importance of the erroneously admitted evidence to the weight of the other evidence received.¹⁰¹ The Court failed to clarify matters in the 1990 case of *Yates v. Evatt*,¹⁰² in which it discussed the *Chapman* test in detail but ended up applying the hybrid balancing approach.¹⁰³ The Court's latest pronouncement on the issue of the standard of review for claims of trial error is in the 1993 case of *Sullivan v. Louisiana*,¹⁰⁴ which points back in the direction of the *Chapman* test when it states that the proper role for an appellate court in a harmless error decision is to determine "whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error."¹⁰⁵ It seems fair to say that as to this crucial feature of criminal appellate jurisprudence, Supreme Court doctrine is afflicted with chronic confusion.¹⁰⁶

The Louisiana Supreme Court has favored the *Sullivan* definition since it was promulgated. The court first adopted the definition—in a death penalty

99. See Gregory Mitchell, *supra* note 1, at 1344-45 (detailing the cases during this time period).

100. 475 U.S. 673, 106 S. Ct. 1431 (1986).

101. *Id.* at 684, 106 S. Ct. at 1431.

102. 500 U.S. 391, 111 S. Ct. 1884 (1991), *overruled on other grounds by* Estelle v. McGuire, 502 U.S. 62, 112 S. Ct. 475 (1991).

103. *Yates*, 500 U.S. at 402-06, 111 S. Ct. at 1893-95.

104. 508 U.S. 275, 113 S. Ct. 2078 (1993).

105. *Id.* at 279, 113 S. Ct. at 2081.

106. See Gregory Mitchell, *supra* note 1, at 1346-47:

The sum of the Court's activity since *Chapman* is that the harm of constitutional errors may be evaluated under either of two textually-distinct tests, or under a hybrid of the two. Lower court decisions evince this state of confusion: both federal and state courts continue to apply the contribution-to-the-conviction, overwhelming-evidence, and hybrid variants of the harmless error test.

From *Chapman* until the 1993 case of *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710 (1993), the Court gave no indication that any different standard for assessing harmlessness should apply in federal habeas corpus than on direct review. But in *Brecht* the Court held that a more prosecution-favorable standard should apply in habeas corpus, namely, that habeas relief should be granted only when the error "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 637, 113 S. Ct. at 1721. The Court adopted this standard because it reflected the "interest in the finality," *id.* at 635, 113 S. Ct. at 1721, that attaches to a conviction after direct review, and protects the state's sovereign interest in punishing offenders and its "good faith attempts to honor constitutional rights." *Id.* The practical significance of *Brecht* is not in the verbal formulation it used of "substantial and injurious effect," but that it lowered the *Chapman* burden on the prosecution of proving that the error was harmless beyond a reasonable doubt, to merely requiring the prosecution to prove that the error was harmless by a preponderance of the evidence.

decision—shortly after it was put forward by the United States Supreme Court.¹⁰⁷ The Louisiana court has consistently used the *Sullivan* formulation since, in both capital¹⁰⁸ and non-capital¹⁰⁹ cases. The court equates the *Sullivan* formulation with the *Chapman* “harmless beyond a reasonable doubt” formulation.¹¹⁰

B. Unpreserved Claims: “Plain Error”

Overlaying the whole inquiry of harmlessness is the issue of how an appellate court should deal with claims of error that were not properly preserved by the defendant in the trial court. Should an appellate court refuse to consider the claim because it was not properly preserved, or consider the claim on its merits nonetheless? Each jurisdiction has its own approach to this issue, but most jurisdictions discuss the topic under the rubric of “plain error.” In criminal cases in federal court, Rule 52(b) of the Federal Rules of Criminal Procedure,¹¹¹ as construed by the United States Supreme Court in *United States v. Olano*,¹¹² provides the methodology for analysis. Under *Olano*, in order for an appellate court to even have authority to consider reversing on the merits due to unpreserved claims of error, the error must meet a three part test: (1) there must be error; (2) that error must be “plain” in the sense of being “clear” and “obvious”; and (3) the error must affect substantial rights.¹¹³ Even then a court is not required to reverse but may do so in its discretion if the error “seriously affected the fairness, integrity, or public repute of judicial proceedings.”¹¹⁴ This plain error test is the least defendant-favorable of any test for error in any context, as is evidenced by the fact that the Supreme Court has indicated an error can be serious enough to be “structural,” yet not necessarily meet the standard for “plain” error requiring reversal.¹¹⁵

The Court accords death-sentenced defendants no favorable treatment as to plain error. This is most obvious in the Court’s habeas corpus jurisprudence, where virtually all errors, no matter how serious and no matter whether the case is capital, are deemed forfeited if not properly litigated in the state proceedings.¹¹⁶

107. See *State v. Sanders*, 648 So. 2d 1272, 1291 (La. 1994).

108. See, e.g., *State v. Seals*, 684 So. 2d 368, 377 (1996).

109. See, e.g., *State v. McCarthur*, 719 So. 2d 1037, 1043 (La. 1998).

110. *Id.* at 1043 & n.7.

111. Fed. R. Crim. P. 52(b).

112. 507 U.S. 725, 113 S. Ct. 1770 (1993).

113. *Id.* at 732-35, 113 S. Ct. at 1777-79.

114. *Id.* at 735-36, 113 S. Ct. at 1779.

115. *Johnson v. United States*, 520 U.S. 461, 465, 117 S. Ct. 1544, 1548 (1997).

116. In *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S. Ct. 2497, 2506 (1977), the court held that since the adequate and independent state ground rule would prevent the Supreme Court, on direct review, from deciding the merits of a constitutional claim that the state had validly held to be procedurally barred under state law, it would be similarly improper for a federal habeas court to

The handling of unpreserved claims of error on appeal in death penalty cases is a topic on which the Louisiana Supreme Court has broken lockstep. There is no general plain error doctrine in Louisiana.¹¹⁷ Nevertheless, recognizing that "death is different," the Louisiana Supreme Court has been more generous than the United States Supreme Court in its treatment of improperly preserved claims of error in capital cases. In the early 1980's, the Louisiana Supreme Court announced that it would review all claims of error arising out of the sentencing phase, whether properly preserved or not.¹¹⁸ Then in 1989, the court became even more expansive in ruling that it would consider *all* claims of error in death penalty cases, whether arising from the sentencing phase or not.¹¹⁹ But in 1996, the court became less generous by reverting to the stance that it would review only improperly preserved claims in the sentencing phase of capital cases.¹²⁰ Still, this grants more latitude to capital defendants than does the United States Supreme Court doctrine.

IV. THE INTERSECTION OF THE DEATH-IS-DIFFERENT AND HARMLESS ERROR DOCTRINES IN UNITED STATES AND LOUISIANA SUPREME COURT JURISPRUDENCE

A. *Ways of Thinking About How the "Differentness" of the Penalty Phase Corresponds to the Level of Error Review in a Capital Case*

In theory, there are several plausible ways in which the death-is-different principle could interact with the *standard* a court uses to judge the effect of error in a capital case. One plausible line of reasoning is that the death-is-different principle dictates that a court should never uphold a death sentence if there is error anywhere in the proceeding—in effect, a capital trial would have to be perfect to be non-reversible. A more moderate position would hold that the violation of only some particularly important rights should result in automatic reversal, with other errors being judged by generally applicable harmless error standards.

consider an issue that had been procedurally defaulted by the petitioner in state court. The Supreme Court has explicitly held that the *Sykes* principle applies with equal strength to capital petitioners: "[W]e reject the suggestion that the principles of *Wainwright v. Sykes* apply differently depending on the nature of the penalty a State imposes for the violation of its criminal laws." *Smith v. Murray*, 477 U.S. 527, 538, 106 S. Ct. 2661, 2668 (1986).

117. *State v. Thomas*, 427 So. 2d 428, 433 (La. 1982) ("Unlike the federal rules of criminal procedure, our statutory law does not contain an exception to the contemporaneous objection rule which authorizes appellate review of the record in a criminal case for plain error."). *But see State v. Arvie*, 505 So. 2d 44, 47 (La. 1987) ("On very rare occasions, this court has refused to apply the contemporaneous objection rule as a bar to review of an error which was so fundamental that it struck at the very essence of the reliability of the fact-finding process.").

118. *State v. Berry*, 391 So. 2d 406, 411 (La. 1980).

119. *State v. Smith*, 554 So. 2d 676, 678 (La. 1989).

120. *State v. Taylor*, 669 So. 2d 364, 369 (La. 1996).

At the other end of the spectrum, one might plausibly argue that all the death-is-different principle means is that a capital defendant gets some extra rights, but that any violation of rights anywhere in the proceeding should be judged by generally applicable harmless error doctrine; i.e., the defendant gets extra substantive rights, but no extraordinary standard for harmlessness. This has been the Court's approach, the clearest statement of which is found in the 1988 case *Satterwhite v. Texas*.¹²¹ There, the capital defendant's Sixth Amendment right to counsel was violated by introduction at the penalty phase of statements he had made to a State's psychiatrist without the defendant's lawyer having been notified of the interview.¹²² The Texas Court of Criminal Appeals, though, found the constitutional violation to be harmless.¹²³ The United States Supreme Court held that the *Chapman* harmless error test was equally applicable to a capital penalty phase:

It is important to avoid error in capital sentencing proceedings. Moreover, the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer. Nevertheless, we believe that a reviewing court can make an intelligent judgment about whether the erroneous admission of psychiatric testimony might have affected a capital sentencing jury. Accordingly, we hold that the *Chapman* harmless error rule applies to the admission of psychiatric testimony in violation of the Sixth Amendment right set out in *Estelle v. Smith*.¹²⁴

Thus, while the penalty phase is unique, it is not "different" for purposes of harmless error analysis.

B. Selecting Louisiana Supreme Court Cases for Analysis

For purposes of my analysis I included all pertinent Louisiana Supreme Court capital cases decided by the court on direct appeal during the six-year period from January 1, 1993 to December 31, 1998. This sample comprised forty-four cases, a list of which is found in Appendix A.¹²⁵ The forty-four

121. 486 U.S. 249, 108 S. Ct. 1792 (1988). For a commentary critical of *Satterwhite*, see Kenneth A. Zimmern, Note, *Satterwhite v. Texas: A Return to Arbitrary Sentencing?* 42 Baylor L. Rev. 623 (1990).

122. *Satterwhite*, 486 U.S. at 253, 108 S. Ct. at 1797.

123. See *State v. Satterwhite*, 726 S.W.2d 81, 92-93 (1986).

124. *Satterwhite*, 486 U.S. at 258, 108 S. Ct. at 1798.

125. Two defendants appear twice because their cases were reversed early in my six-year sample, *State v. Robertson*, 630 So. 2d 1278 (La. 1994); *State v. Bourque*, 622 So. 2d 198 (La. 1993); each was then resentenced to death; and the appeal of the second death sentence was reported late in the six-year period. *State v. Robertson*, 712 So. 2d 8 (La. 1998); *State v. Bourque*, 699 So. 2d 1 (La. 1997). I treated each appeal as a separate case because each later appeal raised different issues not dependent upon the resolution of the first appeal.

cases involved, by my count, a total of 317 claims of error that were dealt with by the Louisiana Supreme Court in published opinions. Of these 317 claims, the court found about forty instances of error and about ten more instances where it was willing to assume error *arguendo*. I will treat the assuming-*arguendo* instances as findings of error, because they are as illuminating as the actual findings of error concerning the court's approach to the harmlessness issue. Of these roughly fifty errors, the court found fourteen of them in thirteen cases to be reversible (i.e., in one case the court found two reversible errors).¹²⁶

One important thing to note about this body of case law is that the Louisiana Supreme Court has certainly not been a rubber-stamp for death sentences. In six cases, due to error in the penalty phase, the court reversed and vacated the death sentence and ordered a new sentencing hearing.¹²⁷ In six more cases, finding errors that infected the entire proceedings, the court reversed both conviction and sentence and remanded for a new trial.¹²⁸ And in one case, the court found the evidence insufficient to support a verdict of first-degree murder and reduced the conviction to second degree murder, which was not a death-eligible offense.¹²⁹ In total, the court reversed at least the penalty phase of thirteen of the forty-four cases, for a reversal rate of thirty percent. It is also significant, though, that the reversal rate declined dramatically over my six-year sample: during the first two-year segment (1993-94) the court reversed five of eight cases; during the second two-year segment (1995-96) six of seventeen; and during the most recent two-year segment (1997-98) only two of nineteen. The court did not reverse a death penalty case after July 1, 1997, a span which encompasses fifteen other death penalty cases, or thirty-four percent of the total. Whether this is because the court is becoming more favorable to the prosecution, or because judges and

126. See *State v. Sanders*, 648 So. 2d 1272, 1289-93 (La. 1994) (reversible error both for improper use of other crimes evidence at penalty phase, and for ineffective assistance at the penalty phase).

127. See *State v. Hamilton*, 699 So. 2d 29, 32-34 (La. 1997) (ineffective assistance at penalty phase); *State v. Cousan*, 684 So. 2d 382, 392-94 (La. 1996) (improper jury instruction regarding governor's clemency power); *State v. Brooks*, 661 So. 2d 1333 (La. 1995) (ineffective assistance at penalty phase); *State v. Brooks*, 648 So. 2d 366, 375-77 (La. 1995) (improperly admitted evidence at penalty phase); *State v. Sanders*, 648 So. 2d 1272, 1289-93 (La. 1994) (ineffective assistance at penalty phase and improper other crimes evidence at penalty phase); and *State v. Bourque*, 622 So. 2d 198, 246-48 (La. 1993) (improperly admitted evidence at penalty phase).

128. *State v. Divers*, 681 So. 2d 320, 324-27 (La. 1996) (failure to sustain defendant's challenge of venirepersons for cause); *State v. Cross*, 658 So. 2d 683, 685-88 (La. 1995) (failure to sustain defendant's challenge of venireperson for cause); *State v. Maxie*, 653 So. 2d 526, 534-38 (La. 1995) (failure to sustain defendant's challenge of venireperson for cause); *State v. Robertson*, 630 So. 2d 1278, 1283 (La. 1994) (failure to sustain defendant's challenge of venireperson for cause); *State v. Hattaway*, 621 So. 2d 796, 812-15 (La. 1993) (violations of right to counsel and privilege against self-incrimination); and *State v. Hall*, 616 So. 2d 664, 669 (La. 1993) (improper restriction of defense voir dire).

129. See *State v. Hart*, 691 So. 2d 651, 661-62 (La. 1997) (conviction changed to second degree murder and sentence changed to life without parole).

prosecutors are learning from the errors of their colleagues and not committing the same errors, or simply the luck of the draw, is impossible to determine.

One additional important point about my sample of cases is that, for whatever reason (probably a mixture of good judgment and scarcity of resources to prosecute time-consuming and costly capital cases), Louisiana prosecutors generally only seek death sentences in the most egregious homicides.¹³⁰ Thus, the group of death-sentenced defendants that has come before the Louisiana Supreme Court over the last six years has not been one that might induce a soft-hearted court to cut them any breaks in applying harmless error analysis.

C. Aspects of Capital Cases Prior to the Penalty Phase (Except Witt and Morgan Voir Dire Issues)

Recall that the United States Supreme Court has never held—except perhaps with respect to pre-penalty phase expert assistance that relates directly to that phase¹³¹—that a capital defendant is entitled to any greater rights prior to the penalty phase. We will see that the Louisiana Supreme Court has taken this position to heart.

130. In the 42 cases in my six-year sample, each of them had at least one very obvious exacerbating factor. The most common was that the killing occurred during the contemporaneous felony of robbery and/or burglary and/or sexual assault (31 cases). Two other exacerbating factors tied for second: 18 cases involved what I would denominate "overkill," i.e., much more violence than necessary to kill the victim; and 18 cases involved multiple victims, i.e., defendant killed more than one person, or killed one person and grievously wounded at least one other person, with intent to kill. The third-place exacerbating factor was that the victim was particularly vulnerable because he or she was young or elderly (10 cases). Two other cases involved the exacerbating factor of murder for hire, and one case involved the exacerbating factor that the victim was an on-duty police officer. And, as the above figures show, many of the cases involved more than one of these exacerbating factors: 3 cases had 4 such factors, 3 cases had 3 such factors, and 21 cases had 2 such factors, for a total of 28 of the 42 cases with multiple exacerbating factors. Of the remaining 12 cases, 4 of them involved mainly the exacerbating factor of multiple victims but, since I would view each victim as an additional exacerbating factor these cases, too, had multiple factors. Two of the remaining cases involved juvenile victims, obviously a crime that provokes great outrage. Two others involved overkill, which also places them in the most heinous category. What remains is four cases which may be the "weakest" from a death penalty standpoint, all of which involve murder during an armed robbery, a relatively run-of-the-mill type of first degree murder. One of these was the lone case that the court reversed in my sample for lack of sufficient evidence of first degree murder, and rightly so: while the defendant had burgled the elderly victim's house and robbed him, he had only tied up the victim loosely and not otherwise injured him. The victim was unable to call for help and died as a result of lingering injuries from the ordeal. See *State v. Hart*, 691 So. 2d 651, 661-62 (La. 1997).

131. See *Ake v. Oklahoma*, 470 U.S. 68, 84, 105 S. Ct. 1087, 1096-97 (1985). For a discussion of *Ake*, see *supra* notes 33-36 and accompanying text.

I. Non-Evidence-Related

In examining the Louisiana Supreme Court case law, I will first consider aspects of the proceedings that occur pretrial or during the guilt/innocence phase, but that do not deal with evidence, argument, or jury instructions. I will characterize claims of error as "non-evidence-related." The Louisiana Supreme Court has certainly not used any more defendant-favorable standards for pretrial proceedings in death penalty cases. The court used the same standards during my six-year sample as in non-death penalty cases for issues such as the validity of the indictment,¹³² change of venue,¹³³ denial of motions for continuance,¹³⁴ discovery permitted by the prosecution,¹³⁵ discovery not permitted by the defense,¹³⁶ sequestration of jurors,¹³⁷ and a potpourri of other pretrial matters.¹³⁸ Using generally applicable standards, the court has found only two

132. See *State v. Strickland*, 683 So. 2d 218, 225-27 (La. 1996) (rejecting claim of duplicitous indictment); *State v. Sanders*, 648 So. 2d 1272, 1283 (La. 1994) (rejecting claim that indictment was improperly amended, but reversing sentence on other grounds).

133. See *State v. Williams*, 708 So. 2d 703, 728-29 (La. 1998) (rejecting claim that venue should have been changed); *State v. Connolly*, 700 So. 2d 810, 814-15 (La. 1997) (same); *State v. Hart*, 691 So. 2d 651, 655-56 (La. 1997) (same, but reversing conviction on other grounds); *State v. Cousan*, 684 So. 2d 382, 386 (La. 1996) (same, conviction affirmed but reversing sentence on other grounds).

134. *State v. Strickland*, 683 So. 2d 218, 229-30 (La. 1996) (rejecting claim that defendant should have been granted a continuance); *State v. Martin*, 645 So. 2d 190, 196-97 (La. 1994) (same); *State v. Bourque*, 622 So. 2d 198, 224 (La. 1993) (conviction affirmed but reversing sentence on other grounds).

135. See *State v. Brumfield*, No. 96-KA-2667, 1998 WL 727412 (La. Oct. 20, 1998) (rejecting claim that prosecution was impermissibly granted discovery); *State v. Allen*, 682 So. 2d 713, 721 (La. 1996) (same).

136. *State v. Seals*, 684 So. 2d 368, 378-79 (La. 1996) (rejecting claim that prosecution failed to provide discovery); *State v. Strickland*, 683 So. 2d 218, 235 (La. 1996) (same); *State v. Allen*, 682 So. 2d 713, 726 (La. 1996) (same); *State v. Sanders*, 648 So. 2d 1272, 1280-81 (La. 1994) (same, conviction affirmed but reversing sentence on other grounds).

137. See *State v. Robertson*, 712 So. 2d 8, 22-24 (La. 1998) (rejecting claim regarding improper sequestration of jurors); *State v. Strickland*, 683 So. 2d 218, 236 (La. 1996) (same); *State v. Allen*, 682 So. 2d 713, 727 (La. 1996) (same); *State v. Taylor*, 669 So. 2d 364, 379-81 (La. 1996) (same).

138. See *State v. Brumfield*, No. 96-KA-2667, 1998 WL 727412, 14-16 (La. Oct. 20, 1998) (rejecting claim that trial court improperly failed to assure that there was a written record of all proceedings); *State v. Ortiz*, 701 So. 2d 922, 928-29 (La. 1997) (rejecting claim that trial court erred in refusing to defer the defense opening statement at the guilt phase); *State v. Seals*, 684 So. 2d 368, 380 (La. 1996) (rejecting claim that defendant was entitled to a delay between the denial of the motions for new trial and the imposition of sentence); *State v. Strickland*, 683 So. 2d 218, 238 (La. 1996) (rejecting claim that trial court should have held a hearing on the pre-sentence report); *State v. Sepulvado*, 672 So. 2d 158, 163 (La. 1996) (rejecting claim that trial court should have appointed a sanity commission); and *State v. Davis*, 637 So. 2d 1012, 1019 (La. 1994) (rejecting claim that defendant was entitled to have two charges against him severed). See also *State v. Langley*, 711 So. 2d 651, 668 (La. 1998) (rejecting claim that defendant was improperly excluded from the trial; defendant's behavior was sufficiently disruptive to justify exclusion); *State v. Baldwin*, 705 So. 2d 1076, 1080 (La. 1997) (rejecting claim that courtroom outburst at the guilt/innocence phase constituted error); *State v. Strickland*, 683 So. 2d 218, 236 (La. 1996) (rejecting claim that defendant

non-evidence-related claims by capital defendants that it viewed as even arguably meritorious, and in both instances viewed the possible errors as harmless.¹³⁹

The Louisiana Supreme Court in my six-year case study often dealt with claims of error in death penalty cases regarding voir dire (not of the *Witt* and *Morgan* varieties).¹⁴⁰ Only once did the court find a reversible error¹⁴¹ and,

was improperly excluded from proceeding in chambers where portions of documents were being excised); *State v. Tart*, 672 So. 2d 116, 124-25 (La. 1996) (rejecting claim of conflict of interest by defense counsel); *State v. Scales*, 655 So. 2d 1326, 1329-30 (La. 1995) (rejecting claim of improperly admitted hearsay at preliminary hearing); *State v. Sanders*, 648 So. 2d 1272, 1277-78 (La. 1994) (rejecting claim that defendant was improperly extradited, but reversing sentence on other grounds); *State v. Bourque*, 622 So. 2d 198, 217-19 (La. 1993) (rejecting claim that the district attorney should have been recused, but reversing sentence on other grounds).

139. See *State v. Brumfield*, No. 96-KA-2667, 1998 WL 727412 (La. Oct. 20, 1998) (arguably error for the trial court to order disclosure of the defendant's expert's report, but harmless in any event); and *State v. Strickland*, 683 So. 2d 218, 225-27 (La. 1996) (error in joinder of capital and noncapital offenses for trial was harmless).

140. One discrete category of such claims is that a prospective juror was struck for an improper reason such as race or gender. The Louisiana Supreme Court has consistently rejected such claims of errors. See *State v. Tyler*, 723 So. 2d 939 (La. 1998) (upholding refusal of trial judge to permit defense striking of four prospective jurors which the trial court had concluded would be done solely on a racial basis); *State v. Robertson*, 712 So. 2d 8, 24 (La. 1998) (rejecting claim that prosecution improperly exercised a challenge on a racial basis); *State v. Langley*, 711 So. 2d 651, 674-75 (La. 1998) (rejecting claim that trial court refused to take steps to enable mothers of small children to sit as jurors); *State v. Williams*, 708 So. 2d 703, 726-27 (La. 1998) (rejecting claim that state impermissibly exercised its peremptory challenges on a racial basis); *State v. Bourque*, 699 So. 2d 1, 6-8 (La. 1997) (rejecting claims that prosecution improperly exercised a challenge on a racial basis and exercised improper challenges on a gender basis); *State v. Seals*, 684 So. 2d 368, 375 (La. 1996) (rejecting claim that prosecution improperly exercised challenges on a racial basis); *State v. Strickland*, 683 So. 2d 218, 230 (La. 1996) (rejecting claim that defense lawyer was improperly allowed to strike prospective jurors on the basis of gender).

The Louisiana Supreme Court has also rejected many voir dire claims of miscellaneous variety. See *State v. Chester*, 724 So. 2d 1276 (La. 1998) (allowing victim's mother in the courtroom during voir dire); *State v. Connolly*, 700 So. 2d 810, 815-19 (La. 1997) (some jurors knew that defendant was linked to another murder besides the one charged); *State v. Bourque*, 699 So. 2d 1, 5-6 (La. 1997) (claim that prosecutor during voir dire lessened the jury's sense of responsibility by referring to their possible death sentence as a "recommendation"); *State v. Cousan*, 684 So. 2d 382, 387-88 (La. 1996) (rejecting claims that trial court erred in denying individual sequestered voir dire and in allowing a deputy to select jurors from bystanders at the courthouse, but reversing sentence on other grounds); *State v. Allen*, 682 So. 2d 713 (La. 1996) (claim that trial court erred in denying request for individual voir dire in requiring both defense counsel and prosecutor to exercise challenges for cause within hearing of the prospective jurors and claim that several prospective jurors were biased due to knowledge about the case or the participants); *State v. Hamilton*, 681 So. 2d 1217, 1222-23 (La. 1996) (claim that full voir dire was denied due to courtroom noise, fast pace of jury selection and limitations on questioning of prospective jurors); *State v. Taylor*, 669 So. 2d 364, 376-78 (La. 1996) (claim that trial court erred by refusing to allow defendant to exercise peremptory challenges after state and defense had provisionally accepted individual jurors); *State v. Bourque*, 622 So. 2d 198, 224-30, 232-33 (La. 1993) (claim of error for denial of individual sequestered voir dire, for failure to exclude several jurors for cause and for alleged incorrect method of numbering jurors and calling panels for examination, but reversing sentence on other grounds).

141. *State v. Cross*, 658 So. 2d 683, 685-88 (La. 1995) (failure to excuse for cause a prospective

in only one other case has the court found a voir dire claim to have arguable merit while finding the error, if any, to be harmless.¹⁴² Given that the voir dire process is so completely within the control and discretion of the trial judge, it is not surprising that the Louisiana Supreme Court has been quite deferential to trial judges as to these issues.

I did not find any of the non-evidence related claims dealt with by the Louisiana Supreme Court to have been improperly decided. None of the issues impacted directly enough on the penalty phase evidence to warrant special harmless error treatment under the culmination-of-the-process view.

2. Evidence-Related

The United States Supreme Court has never suggested that capital defendants have any additional rights at the guilt/innocence phase. Indeed, the *Ramos* doctrine suggests exactly the opposite.¹⁴³ Neither has the Court suggested that any different standards for judging error should apply. Similarly, the Louisiana Supreme Court used no different rules and standards for claims of error arising at the guilt/innocence phase of a capital proceeding during my sample period. The court used the same standards for claims of error, evidentiary error, prosecutorial misconduct, instructional error and sufficiency of the evidence. These categories warrant some further discussion because they so consistently give rise to claims of error.

Defense claims of error based on the improper admission of the prosecution's evidence at the guilt/innocence phase were raised by many capital defendants. One discrete group of claims consisted of those concerning evidence allegedly admitted in violation based on United States Supreme Court criminal procedure jurisprudence. Most of the claims arose under the combined Fifth Amendment privilege against self-incrimination and Sixth Amendment right to counsel,¹⁴⁴ while a few arose under the Fourth Amendment's search and seizure

juror who had been a high school biology student of the victim and who said that the victim had helped the prospective juror "a lot").

142. See *State v. Frost*, 727 So. 2d 417 (La. 1998) (finding that a miniature closing argument included in a voir dire question by the prosecutor, which was promptly objected to and sustained, but did not influence the juror's ability to render an impartial verdict).

143. See *supra* note 31 and accompanying text.

144. Claims that the defendant's confession was improperly admitted were rejected in the following cases: *State v. Letulier*, No. 97-KA-1360, 1998 WL 378356 (La. July 8, 1998); *State v. Cooks*, 720 So. 2d 637 (La. 1998); *State v. Robertson*, 712 So. 2d 8, 28-32 (La. 1998); *State v. Langley*, 711 So. 2d 651, 668-71 (La. 1998); *State v. Lavalais*, 685 So. 2d 1048, 1053-54 (La. 1996); *State v. Seals*, 684 So. 2d 368, 380 (La. 1996); *State v. Cousan*, 684 So. 2d 382, 386-87 (La. 1996) (but reversing sentence on other grounds); *State v. Tart*, 672 So. 2d 116, 126-31 (La. 1996); *State v. Sepulvado*, 672 So. 2d 158, 163 (La. 1996); *State v. Scales*, 655 So. 2d 1326, 1331-32 (La. 1995); *State v. Brooks*, 648 So. 2d 366, 371-75 (La. 1995) (but reversing sentence on other grounds); *State v. Sanders*, 648 So. 2d 1272, 1281-83 (La. 1994) (but reversing sentence on other grounds); *State v. Davis*, 637 So. 2d 1012, 1024-25 (La. 1994).

clause.¹⁴⁵ The Louisiana Supreme Court used the same standards for determination of these issues as in non-capital cases. The court has only found three instances of error as to these issues, and held two of them harmless¹⁴⁶ and the other reversible.¹⁴⁷

The other discrete category of claims of error regarding the admission of the prosecution's evidence at the guilt/innocence phase relates to admission of evidence of other crimes of the defendant.¹⁴⁸ The court has found three instances in which such claims were at least arguably meritorious, but has in each instance found that the error, if any, was harmless.¹⁴⁹

In the following cases the court rejected a claim that the prosecutor had improperly commented on the defendant's failure to testify in violation of the Fifth Amendment's privilege against self-incrimination: *State v. Craig*, 699 So. 2d 865, 869-70 (La. 1997); *State v. Hamilton*, 681 So. 2d 1217, 1225 (La. 1996); *State v. Bourque*, 622 So. 2d 198, 240-41 (La. 1993) (but reversing sentence on other grounds).

145. In the following cases, the court rejected claims of illegal search and seizure: *State v. Strickland*, 683 So. 2d 218, 227-29 (La. 1996); *State v. Allen*, 682 So. 2d 713, 718 (La. 1996); *State v. Davis*, 637 So. 2d 1012, 1021-22 (La. 1994); *State v. Bourque*, 622 So. 2d 198, 221 (La. 1993) (but reversing sentence on other grounds).

146. See *State v. Koon*, 704 So. 2d 756, 763-64 (La. 1997) (defendant's statements to detectives made after the defendant had requested the interrogation to stop should have been suppressed. However, the erroneous admission was insignificant in relation to the whole of the evidence and the jury's rejection of the defendant's defense was surely unattributable to the error.); *State v. Taylor*, 669 So. 2d 364, 379 (La. 1996) (erroneous admission of defendant's confession surely did not contribute to the verdict where the defendant at trial admitted guilt from voir dire through the penalty phase).

147. *State v. Hattaway*, 621 So. 2d 796, 812-15 (La. 1993) (reversible error to admit statements obtained by moving the defendant from one parish to another without telling his attorney and inducing defendant to waive right to counsel thereafter).

148. In the following cases the court rejected claims that evidence of crimes other than those for which the defendant was on trial had been improperly admitted. See *State v. Tyler*, 723 So. 2d 939 (La. 1998); *State v. Cooks*, 720 So. 2d 637, 647-51 (La. 1998); *State v. Williams*, 708 So. 2d 703, 725-26 (La. 1998); *State v. Hart*, 691 So. 2d 651, 659 (La. 1997) (but reversing conviction on other grounds); *State v. Scales*, 655 So. 2d 1326, 1330-31 (La. 1995); *State v. Sanders*, 648 So. 2d 1272, 1283-85 (La. 1994) (but reversing sentence on other grounds); *State v. Martin*, 645 So. 2d 190, 198 (La. 1994); *State v. Code*, 627 So. 2d 1373, 1381-83 (La. 1993); *State v. Bourque*, 622 So. 2d 198, 233-35 (La. 1993) (but reversing sentence on other grounds).

149. See *State v. Tyler*, 723 So. 2d 939 (La. 1998) (evidence that after the defendant became suspected of the murder the police set up a drug deal "sting" for his arrest; while the evidence of the "sting" was not properly admissible, nonetheless the court was convinced beyond a reasonable doubt that the jury's verdict had actually rested on the admissible evidence); *State v. Cooks*, 720 So. 2d 637 (La. 1998) (verdict was surely unattributable to the erroneous admission of evidence of the defendant's gang affiliation); *State v. Martin*, 645 So. 2d 190, 198 (La. 1994) (where defendant's motive for killing the rape victim was so she could not testify against him later and send him back to prison; while it was unnecessary to introduce evidence concerning the sex crime nature of the defendant's earlier conviction, the incremental prejudice of the reference to that conviction by name did not outweigh the extremely high probative value of the fact that the defendant had been imprisoned, which gave him a motive for the later murder).

Defendants in my sample raised a potpourri of other claims regarding inadmissible prosecution evidence.¹⁵⁰ The Louisiana Supreme Court has found several instances where there was merit to the claim that the prosecution's evidence was improperly admitted, but in each instance found this instance to be harmless.¹⁵¹

As to claims of improper argument by the prosecutor, there is at least a hint in United States Supreme Court jurisprudence that a prosecutor's argument can go so far beyond the pale as to constitute reversible error. In *Darden v. Wainwright*,¹⁵² the Court stated that a prosecutor's improper comments would have to be so egregious as to "[infect] the trial with unfairness as to make the resulting conviction a denial of due process."¹⁵³ In my six-year case sample, such claims were relatively infrequently raised as to prosecutorial argument at the guilt/innocence phase. None of the claims resulted in reversal, for various reasons: the claim was waived because the prosecutor's remark was not objected

150. The Louisiana Supreme Court has rejected the following claims of improperly admitted prosecution evidence: *State v. Chester*, 724 So. 2d 1276, 1287-88 (La. 1998) (claim of improperly admitting letters written from prison by the defendant to attempt to influence a witness); *State v. Brumfield*, No. 96-KA-2667, 1998 WL 727412 (La. Oct. 20, 1998) (claim that surviving victim's testimony should have been excluded because the witness had once been hypnotized); *State v. Robertson*, 712 So. 2d 8, 32 (La. 1998) (claim that gruesome photos were improperly admitted); *State v. Koon*, 704 So. 2d 756, 768 (La. 1997) (claim that testimony of expert physician regarding defendant's sane mental condition violated a claim of privilege and of right to counsel); *State v. Ortiz*, 701 So. 2d 922, 929-30 (La. 1997) (claim of improper admission of evidence of death threat from unspecified person in jail, who might have been the defendant, to a witness); *State v. Sepulvado*, 672 So. 2d 158, 164 (La. 1996) (claim of improper admission of gruesome photos); *State v. Martin*, 645 So. 2d 190, 198-99 (La. 1994) (claim of improper admission of gruesome photos); *State v. Davis*, 637 So. 2d 1012, 1025-26 (La. 1994) (claim of improper admission of videotape from convenience store camera of murder of clerk); *State v. Bourque*, 622 So. 2d 198, 236-37 (La. 1993) (claim of improper admission of gruesome photo and murder victim's clothes, but reversing sentence on other grounds).

151. See *State v. Gradley*, No. 97-KA-0641, 1998 WL 252461 (La. May 19, 1998) (while admission of videotape of live victim stating her age may have been cumulative in order to prove that the victim was over the specified age at the time of death, such evidence was brief and could not have affected the jury's verdict); *State v. Lavalais*, 685 So. 2d 1048, 1051-52 (La. 1996) (even if letter from defendant's co-conspirator in prison was inadmissible hearsay, admission was harmless because letter contained no new evidence and in fact was used by defendant in penalty phase to support argument he was under the control of the co-defendant at the time of the killing); *State v. Sanders*, 648 So. 2d 1272, 1286-87 (La. 1994) (two inadmissible hearsay statements, one of which attributed ownership of firearms to the defendant, and a second of which described defendant's paying for a new car with cash and registering the vehicle in a friend's name, were harmless because these misdeeds were not connected with the crime charged, as to which the evidence against the defendant was so strong that the verdict was surely unattributable to the error, but reversing sentence on other grounds); *State v. Code*, 627 So. 2d 1373, 1385 (La. 1993) (detective's testimony that the defendant must have left the palmprint, while improper, was harmless because the jurors must have concluded that fact anyway in order to find the defendant as the culprit).

152. 477 U.S. 168, 106 S. Ct. 2464 (1986).

153. *Id.* at 181, 106 S. Ct. at 2471 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 1871 (1974) (a noncapital case)).

to;¹⁵⁴ the claim of error was simply wrong;¹⁵⁵ any misstatement of law by the prosecutor was corrected by the trial court's instructions;¹⁵⁶ or the error was harmless.¹⁵⁷

It is relatively unusual for defendants to claim that evidence that they wished to introduce (including cross-examination question of prosecution witnesses) was improperly excluded. In the few instances in which defendants have raised such claims,¹⁵⁸ the Louisiana Supreme Court has treated them the same as in non-capital cases, has found one claim to even constitute error, and held it to be harmless.¹⁵⁹

There were also fewer claims of error in jury instructions at the guilt/innocence phase than one might expect. The Louisiana Supreme Court did not find any guilt-phase jury instructions claims to have merit.¹⁶⁰

154. See *State v. Williams*, 708 So. 2d 703, 715 (La. 1998) (reference by prosecutor during the guilt phase to the victim as a "good man, nice man" was not preserved for appeal because not objected to); *State v. Roy*, 681 So. 2d 1230, 1239 (La. 1996) (rejection of claim that prosecutor had improperly referred to a presumption of intent from actions because no objection was made; and in any event any error was cured by a trial court instruction).

155. See *State v. Craig*, 699 So. 2d 865, 869-70 (La. 1997) (rejecting claim that prosecutor had improperly commented on the defendant's failure to testify); *State v. Allen*, 682 So. 2d 713, 726 (La. 1996) (prosecutor had not violated the Louisiana rule against referring to the defendant's confession during the prosecution's opening statement); *State v. Bourque*, 622 So. 2d 198, 231-32 (La. 1993) (prosecutor had not incorrectly explained the law regarding first-degree murder, specific intent, and intoxication, but reversing sentence on other grounds).

156. *State v. Hart*, 691 So. 2d 651, 659-60 (La. 1997) (prosecutor's misstatement of the law regarding specific intent was corrected by trial court instruction, but reversing conviction on other grounds); *State v. Roy*, 681 So. 2d 1230, 1239 (La. 1996) (prosecutor had improperly stated presumption of actions from intent, but error was not "so dominant" since the trial court judge had properly instructed the jury on the point).

157. *State v. Seals*, 684 So. 2d 368, 376 (La. 1996) (unspecified prosecutorial comments during the guilt phase did not contribute to the verdict); *State v. Strickland*, 683 So. 2d 218, 232 (La. 1996) (prosecutor's violation of the Louisiana rule against referring to the defendant's confession during opening statement was harmless); *State v. Martin*, 645 So. 2d 190, 200-01 (La. 1994) (prosecutor's stigmatizing remarks regarding the defendant and invocation of the feelings of the deceased and her family were harmless error).

158. See *State v. Brumfield*, No. 96-KA-2667, 1998 WL 727412 (La. Oct. 20, 1998) (trial court was within its discretion to curtail defendant's attempts on cross-examination to impeach a surviving witness); *State v. Craig*, 699 So. 2d 865, 871-72 (La. 1997) (court was within its discretion to reject the qualifications of defendant's proposed expert witness); *State v. Lavalais*, 685 So. 2d 1048, 1054-55 (La. 1996) (proper to exclude hearsay statement of another person confessing to killing victim when defendant was able to put ample evidence on the record attempting to connect the other person to the murder); *State v. Davis*, 637 So. 2d 1012, 1027 (La. 1994) (trial court was within its discretion in holding that the defendant's evidence of his claimed habits did not meet the definition of habit).

159. See *State v. Chester*, 724 So. 2d 1276, 1286-87 (La. 1998) (while it was error to prohibit the defendant from impeaching a prosecution witness with her juvenile record, the defendant amply impeached the witness by other means).

160. See *State v. Robertson*, 712 So. 2d 8, 21-22 (La. 1998) (rejecting claim that trial court should have given the jury a complete set of preliminary instructions); *State v. Williams*, 708 So. 2d 703, 717-18 (La. 1998) (rejecting claim that instruction erroneously defined reasonable doubt); *State v. Koon*, 704 So. 2d 756, 768-69 (La. 1997) (rejecting claim that diminished capacity instruction

Defendants regularly claimed that the evidence against them was insufficient to support their eligibility for a capital crime.¹⁶¹ Using the same sufficiency of the evidence test as in non-capital cases, the court only once found this claim to be meritorious, and vacated the first degree murder conviction.¹⁶² The court, instead, held that the evidence supported a second degree murder conviction, reduced the conviction to that level and imposed a sentence of life without parole.¹⁶³

In summary, from 1993 to 1998, the Louisiana Supreme Court found three reversible errors in forty-four death penalty appeals for issues arising outside the *Witt/Morgan* voir dire context and the penalty phase: once for refusing to strike for cause a prospective juror who had known and liked the victim,¹⁶⁴ once for a confession improperly admitted in violation of the Fifth and Sixth Amendments,¹⁶⁵ and once for insufficient evidence to support a first-degree murder conviction.¹⁶⁶ While I have not studied reversal rates in non-capital appeals in Louisiana, I would hazard an educated guess that the reversal rate for these issues is much the same, given that the court uses the same modes of analysis in capital and non-capital cases. Further, under the culmination-of-the-process view, I take no issue with the court's handling of these guilt/innocence phase evidence-related claims. Even where the evidence was arguably improper at that phase, it would

should have been given); *State v. Hart*, 691 So. 2d 651, 660 (La. 1997) (refusing to consider on the merits three claims of improper jury instructions because they were not objected to at trial, but reversing conviction on other grounds); *State v. Hamilton*, 681 So. 2d 1217, 1227 (La. 1996) (no error not to give instruction on presumption of innocence as to an unadjudicated murder when none was requested); *State v. Mitchell*, 674 So. 2d 250, 255 (La. 1996) (no error in instructing jury that defendant could be inferred to intend the natural and probable consequences of his actions); *State v. Sanders*, 648 So. 2d 1272, 1278-80 (La. 1994) (no error in instruction that allegedly precluded the jury from considering lesser verdict of heat of passion manslaughter, but reversing sentence on other grounds); *State v. Bourque*, 622 So. 2d 198, 243 (La. 1993) (rejecting claims that instructions regarding reasonable doubt and direct and circumstantial evidence were confusing, but reversing sentence on other grounds).

161. See *State v. Baldwin*, 705 So. 2d 1076, 1078 (La. 1997); *State v. Ortiz*, 701 So. 2d 922, 930-37 (La. 1997); *State v. Lavalais*, 685 So. 2d 1048, 1055-56 (La. 1996); *State v. Cousan*, 684 So. 2d 382, 390-91 (La. 1996) (but reversing sentence on other grounds); *State v. Seals*, 684 So. 2d 368, 373-74 (La. 1996); *State v. Sepulvado*, 672 So. 2d 158, 164-55 (La. 1996); *State v. Scales*, 655 So. 2d 1326, 1336 (La. 1995); *State v. Maxie*, 653 So. 2d 526, 531-34 (La. 1995) (but reversing conviction on other grounds); *State v. Martin*, 645 So. 2d 190, 194-96 (La. 1994); *State v. Davis*, 637 So. 2d 1012, 1020-21 (La. 1994); *State v. Bourque*, 622 So. 2d 198, 242-43 (La. 1993) (but reversing sentence on other grounds).

162. *State v. Hart*, 691 So. 2d 651, 661-62 (La. 1997) (in case where defendant had burglarized victim's house and tied victim's wrists and feet without causing any physical injury to the victim, and elderly victim had died two weeks later in the hospital as the result of injury to wrists and malnutrition, there was insufficient evidence to support a finding that the defendant had specific intent to kill or inflict great bodily harm upon the victim as is required for first degree murder).

163. *Id.* at 662.

164. *State v. Cross*, 658 So. 2d 683, 685-88 (La. 1995).

165. *State v. Hattaway*, 621 So. 2d 796, 812-15 (La. 1993).

166. *State v. Hart*, 691 So. 2d 651, 661-62 (La. 1997).

invariably have been admissible at the penalty phase anyway. It is hard to see harm under these circumstances.

D. The Witt and Morgan Precepts as They Arise in Practice

1. United States Supreme Court Jurisprudence

The way the *Witt* issue typically arises on appeal is for the defendant to claim that the prosecutor was improperly permitted to strike a qualified juror for cause. An obvious response by the prosecution is that even if the challenge for cause was improperly permitted, the error was harmless as long as all the jurors who were eventually impaneled were qualified, since the defendant has no right to have any particular qualified venireperson sit on the jury. The United States Supreme Court addressed this controversy in a rather unusual factual context in *Gray v. Mississippi*.¹⁶⁷ In that case the trial judge recognized, as the voir dire proceeded, that he had mistakenly overruled several prosecutorial challenges for cause for jurors who were in fact excludable under the then-prevailing *Witherspoon* test.¹⁶⁸ The prosecutor was out of peremptory challenges by the time a qualified, but anti-death penalty leaning venireperson was examined.¹⁶⁹ The prosecutor asked that the venireperson be stricken for cause even though she was qualified, as a sort of "make-up" for the challenges for cause the trial judge had wrongly denied, which had depleted the prosecutor's peremptory challenges.¹⁷⁰ The trial court struck the juror for cause even though she was qualified.¹⁷¹

The United States Supreme Court held that the striking for cause of a death-qualified juror was automatically reversible and not subject to harmless error analysis.¹⁷² The Court reasoned that the proper question was not whether the defendant had a right to have that particular death-qualified juror serve, but instead, "whether the composition of the *jury panel as a whole* could possibly have been affected by the trial court's error."¹⁷³ It was clear on the facts that the composition of the jury panel as a whole had been affected by the error because, absent the improper strike for cause, that venireperson would have been impaneled because the prosecutor did not have a peremptory challenge left with which to remove her. The Court then concluded that this error was automatically reversible: "Because the *Witherspoon-Witt* standard is rooted in the constitutional right to an impartial jury, and because the impartiality of the adjudicator goes to the very integrity of the legal system, the *Chapman* harmless-error analysis

167. 481 U.S. 648, 107 S. Ct. 2045 (1987).

168. *Id.* at 651-66, 107 S. Ct. at 2048-55.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 668, 107 S. Ct. at 2057.

173. *Id.* at 665, 107 S. Ct. at 2055 (quoting *Moore v. Estelle*, 670 F.2d 56, 58 (5th Cir. 1982)).

cannot apply."¹⁷⁴ Thus, as of the time of the *Gray* decision, it seemed that the improper allowance of a strike for cause of a death-qualified juror was an example of what the Court would later term a "structural defect" that mandated automatic reversal.

But just one year later, in *Ross v. Oklahoma*,¹⁷⁵ the Court addressed an issue that was on the opposite side of the coin from the *Gray* issue, namely, whether the trial court's refusal to permit the defense challenge for cause to a juror who was not death-qualified under the *Morgan* precept could be harmless error. In the course of answering this question, the Court gave reason to doubt that the per se reversibility rule of *Gray* was still good law. In *Ross*, the trial court failed to excuse for cause a pro-death penalty leaning juror whose attitude was so entrenched as to violate the *Morgan* precept.¹⁷⁶ The defense, predictably, used a peremptory challenge on that juror.¹⁷⁷ The final jury panel did not have any members who were challengeable for cause under *Morgan*.¹⁷⁸ Thus, the issue on appeal was whether it was per se reversible error for the trial court to have improperly denied the defendant's challenge for cause, thereby forcing the defendant to exercise one of its peremptory challenges that it might have used on another venireperson.¹⁷⁹ The defendant's argument looked strong based on the precedent of *Gray*, which had held that the relevant inquiry is whether the composition of the jury panel as a whole could possibly have been affected by the error.¹⁸⁰ On the facts of *Ross*, the composition of the panel was possibly affected, because if the trial court had properly allowed the challenge for cause the defendant would have had an additional peremptory challenge that it might have used on one of the jurors who ended up being impaneled.

But the Court in *Ross* distinguished *Gray*: "We decline to extend the rule of *Gray* beyond its context: the erroneous '*Witherspoon* exclusion' of a qualified juror in a capital case. We think the broad language used by the *Gray* Court is too sweeping to be applied literally, and is best understood in the context of the facts there involved."¹⁸¹ The Court went on to conclude that the error in failing to exclude the venireperson for cause was not even of constitutional dimension:

Petitioner was undoubtedly required to exercise a peremptory challenge to cure the trial court's error. But we reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury. We have long recognized that peremptory challenges are not of constitutional dimension. They are a means to

174. *Gray*, 481 U.S. at 668, 107 S. Ct. at 2057 (internal citations omitted).

175. 487 U.S. 81, 108 S. Ct. 2273 (1988).

176. *Id.* at 84, 108 S. Ct. at 2276.

177. *Id.*

178. *Id.*

179. *Id.* at 86, 108 S. Ct. at 2277.

180. *Gray*, 481 U.S. at 665, 107 S. Ct. at 2055.

181. *Ross*, 487 U.S. at 87-88, 108 S. Ct. at 2278 (internal citations omitted).

achieve the end of an impartial jury. So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated. We conclude that no violation of petitioner's right to an impartial jury occurred.¹⁸²

The issue that is at yet undecided by the Supreme Court is whether, in distinguishing the *Gray* case, the *Ross* Court largely overruled it by shifting the focus from the possible effect on the composition of the jury panel as a whole to the very narrow—and unlikely-to-arise—right of the defendant to not have a death-qualified juror disqualified when it is clear that juror would have been impaneled because the prosecution was fresh out of peremptory challenges. In a fairly recent case, the Mississippi Supreme Court concluded that *Gray* should indeed be limited to its very unusual facts: "We think it clear that the United States Supreme Court, in *Ross*, limited the holding of *Gray* to 'the context of the facts there involved,' i.e., erroneous *Witherspoon* exclusions where the veniremember would have served on the defendant's jury but for the trial judge's erroneous exclusion."¹⁸³

It is a tough call whether the constitutional focus should be, as in *Gray*, on the composition of the jury panel as a whole, or as in *Ross*, on whether the jurors who were impaneled were qualified to sit. An argument in favor of the *Gray* position is that if improper prosecution challenges for cause do not constitute cause for reversal as long as the ultimately selected jurors were fit to serve, then the defendant will usually have no remedy for a violation of the *Witt* precept. On the other hand, it seems hard to say that a defendant's death sentence is faulty when it was rendered by properly qualified jurors. The Louisiana Supreme Court has solved the quandary in a defendant-favorable manner by holding that the broader "structural defect" reading of *Gray* is still good law, i.e., that the trial court's striking for cause of a death-qualified juror who meets the *Witt* standard is automatically reversible as long as the defendant has exercised all his peremptory challenges.¹⁸⁴ This charitable reading has, however, not benefited any capital defendants in the last six years in Louisiana, because in none of the numerous instances where the defendant raised such a challenge on appeal has the Louisiana Supreme Court found that the trial court improperly struck for cause such a venireperson.¹⁸⁵ The deck is stacked against such a

182. *Id.* at 88, 108 S. Ct. at 2278 (internal citations omitted).

183. *Russell v. State*, 670 So. 2d 816, 825 (Miss. 1995).

184. *See State v. Frost*, 727 So. 2d 417, 423 (La. 1998) ("It is reversible error for a trial court to improperly excuse such a venireman [who is qualified under the *Witt* precept] despite the fact that the State could have used a peremptory challenge to strike the juror." (citing *Gray*)).

185. *See State v. Frost*, 272 So. 2d 417, 424 (La. 1998); *State v. Letulier*, No. 97-KA-1360, 1998 WL 378356, at *5 (La. July 8, 1998); *State v. Robertson*, 712 So. 2d 8, 25 (La. 1998); *State v. Langley*, 711 So. 2d 651, 672 (La. 1998); *State v. Williams*, 708 So. 2d 703, 712-13 (La. 1998); *State v. Gradley*, No. 97-KA-0641, 1998 WL 252461, at *8 (La. May 19, 1998); *State v. Koon*, 704

claim by a defendant because of the United States Supreme Court's statement in *Witt* that the trial court is within its discretion in striking a juror for cause if the trial court is left with "the definite impression"¹⁸⁶ that the prospective juror is impaired. Since this definite impression can be, at least in part, based upon the trial court's observations of the venireperson's demeanor during the voir dire, an appellate court is loath to say that the trial court abused its discretion in determining that a juror was unfit to serve under the *Witt* standard. However, in one case the court did find reversible error for improper restriction of defense counsel's voir dire designed to test the venirepersons' death penalty attitudes.¹⁸⁷

Not only has the Louisiana Supreme Court stuck with a broad reading of the holding of *Gray*, it has also broken lockstep with the United States Supreme Court holding in *Ross*. Prior to *Ross*, the Louisiana Supreme Court had held that under the Louisiana Constitution and statutes, a defendant had a protectible interest in the exercise of peremptory challenges such that a trial court's improperly forcing the defendant to exercise a peremptory challenge as to a venireperson who should have been dismissed for cause constituted an automatically reversible error.¹⁸⁸ The Louisiana Supreme Court has continued to adhere to this position after *Ross*.¹⁸⁹

The possibility that this defendant-favorable break with lockstep in Louisiana could be a bonanza of reversibility is considerably tempered by the fact that the trial judge still has a great deal of discretion in determining whether a juror is in fact unfit to serve under the *Morgan* precept. But despite this leeway given to the trial judge, the Louisiana Supreme Court reversed three sentencing proceedings in my six-year sample for the improper denial of a defendant's challenge for cause under the *Morgan* precept.¹⁹⁰ The three reversals on this issue tied with three reversals for ineffective assistance of counsel at the penalty phase as the greatest number of successful appellate challenges of any issue.

It is hard to find constitutional fault with the Louisiana Supreme Court for the numerous instances in which it rejected claims of error under the *Morgan*

So. 2d 756, 766-67 (La. 1997); *State v. Strickland*, 683 So. 2d 218, 231 (La. 1996); *State v. Mitchell*, 674 So. 2d 250, 254 (La. 1996); *State v. Tart*, 672 So. 2d 116, 123-24 (La. 1996); *State v. Sanders*, 648 So. 2d 1272, 1287-88 (La. 1994) (but reversing sentence on other grounds).

186. *Wainwright v. Witt*, 469 U.S. 412, 425-26, 105 S. Ct. 844, 852-53 (1985).

187. See *State v. Hall*, 616 So. 2d 664, 669 (La. 1993).

188. See, e.g., *State v. Ross*, 623 So. 2d 643, 644 (La. 1993) ("Prejudice is presumed when a challenge for cause is erroneously denied and all of defendant's peremptory challenges are exhausted. . . . A trial court's erroneous ruling which deprives a defendant of a peremptory challenge substantially violates that defendant's rights."). This holding is based on the Louisiana Constitution, which provides that an accused has the right to challenge jurors peremptorily (La. Const. art. 1, § 17) as effectuated through the Louisiana Code (La. Code Crim. P. art. 799).

189. See, e.g., *State v. Chester*, 724 So. 2d 1276, 1284 (La. 1998) ("Prejudice is presumed when a challenge for cause is denied erroneously by a trial court and the defendant has exhausted his peremptory challenges.").

190. See *State v. Divers*, 681 So. 2d 320, 326 (La. 1996) (conviction reversed for this reason); *State v. Maxie*, 653 So. 2d 526, 534-38 (La. 1995) (same); *State v. Robertson*, 630 So. 2d 1278, 1283 (La. 1994) (same).

precept,¹⁹¹ since the court was not required to break lockstep and hold *Morgan* error to be automatically reversible. Nonetheless, beginning with the proposition that such error is automatically reversible, I think the court has been too deferential to trial judges at least once. Based on the following colloquy, the court found a venireperson not to be challengeable for cause under *Morgan*:

Ms. Galloway was one of several prospective jurors who was challenged for cause by defendant. During the death qualification portion of the voir dire, the prosecutor asked Ms. Galloway whether she could listen to both aggravating factors and mitigating factors and in an appropriate case return a verdict of life imprisonment. She replied that she could return either life imprisonment or death. . . .

GALLOWAY

And so when you say specific intent and there's murder involved, I think that a society that values life so highly, that you forfeit your own when you take someone else's is the kind of society that I want to live in.

So I think the death penalty is necessary and if there are no reasonable doubts about the guilt of the person involved, that although I don't like to see anyone go through that, I think when that person made a choice with that specific intent, then they need to accept the consequences, which in this case that the State is asking for the death penalty, it would be the death penalty.

DEFENSE COUNSEL

Life would not be one of the choices?

GALLOWAY

I would listen to the evidence and the mitigating circumstances. But when you talk about specific intent, that to me says that the person killed. . .

DEFENSE COUNSEL

Right.

GALLOWAY

191. See *State v. Chester*, 724 So. 2d 1276, 1284 (La. 1998) (venireperson did not violate *Morgan* precept); *State v. Koon*, 704 So. 2d 756, 767 (La. 1997) (defendant waived objection by not using all peremptory challenges); *State v. Hart*, 691 So. 2d 651, 656-58 (La. 1997) (venireperson did not violate *Morgan* precept, but reversing sentence on other grounds); *State v. Seals*, 684 So. 2d 368, 376 (La. 1996) (venireperson did not violate *Morgan* precept); *State v. Cousan*, 684 So. 2d 382, 388-90 (La. 1996) (venireperson did not violate *Morgan* precept); *State v. Roy*, 681 So. 2d 1230, 1236, 1239 (La. 1996) (claim not preserved because defendant did not use all peremptory challenges and because venireperson did not violate *Morgan* precept); *State v. Mitchell*, 674 So. 2d 250, 254 (La. 1996) (claim not preserved because defendant did not use all peremptory challenges); *State v. Sepulvado*, 672 So. 2d 158, 164 (La. 1996) (venireperson did not violate *Morgan* precept); *State v. Bourque*, 622 So. 2d 198, 227-28 (La. 1993) (venireperson did not violate *Morgan* precept, but reversing sentence on other grounds).

... for the sake of killing or whatever gain it was going to profit them. And I would listen to the evidence and come back with a verdict that I felt appropriate.

....

DEFENSE COUNSEL

[C]ould you seriously consider any mitigating circumstances that I may bring forward?

GALLOWAY

I find it a contradiction between specific intent and mitigating circumstance.

At this time, defense counsel asked her to let him explain what mitigating circumstances are. Without giving him an opportunity to explain, she stated that she understood mitigating circumstances or "at least I thought I did when I sat down here." Her understanding was that there could be mitigating circumstances when an accidental death occurred or maybe when things go beyond your control, but specific intent says that the act was what you wanted to do. Instead of pursuing the relationship between mitigating circumstances and their role in a specific intent crime, defense counsel moved on to the issue of the governor's power of commutation. Ms. Galloway replied that what the Governor decides later would not have an effect on her decision. She replied:

GALLOWAY

You're asking me if I could listen to the evidence presented by both sides in this case and make a judgment based on what is presented. And that is what I will do.

Defense counsel asked Ms. Galloway if after finding defendant guilty, if she were presented with evidence that he had no prior criminal history, could she consider that factor in deciding life versus death. Her reply was, "if he's guilty of the crime, then he's guilty of the crime . . . whether it's the first time or the tenth time or the twentieth time" and the penalty is "whatever it would be for the crime." Finally, defense counsel asked Ms. Galloway if defendant were proven guilty of killing someone, then should the penalty be death. She replied, "if he's proven guilty of murder with specific intent, death penalty."

After questioning the rest of the jurors, defense counsel challenged Ms. Galloway for cause on the ground that if a specific intent killing were found, her vote would be for the death penalty. The trial judge responded that she thought Ms. Galloway vacillated in her responses and she denied the challenge. Later, defendant used one of his peremptory challenges on Ms. Galloway.

Viewing Ms. Galloway's responses during the entire voir dire, we find no abuse of the trial judge's discretion in refusing to grant a challenge for cause. Ms. Galloway responded to the state's questioning that she would listen to both the aggravating and mitigating circum-

stances and in an appropriate case return a life sentence. Later, when questioned by defense counsel, she replied that there was a contradiction between specific intent and mitigating circumstances. [When defense counsel attempted to explain mitigating circumstances,] she replied that she understood them; however, her responses indicated that she was confused about the application of mitigating circumstances in a specific intent crime because she thought mitigating circumstances could apply only when the crime was accidental. However, she also stated in her colloquy that she would listen to both mitigating and aggravating circumstances, and "make a judgment based on what is presented." Upon review of her entire colloquy, we do not find that Ms. Galloway expressed an unconditional willingness to impose a death penalty under any and all circumstances. In sum, we find no abuse of the trial judge's discretion in denying the defense's challenge for cause of Ms. Galloway.¹⁹²

I disagree. Certainly the more reasonable construction of this exchange is that if Mrs. Galloway found specific intent, she was going to vote for a death sentence, no ifs, ands or buts. There are two other cases, both reversed on other grounds, which I believe also show a dangerous tendency of the court to be too deferential to trial judges regarding the *Morgan* precept.¹⁹³ The pattern gives one cause to wonder whether the court is giving lip service to automatic reversal for *Morgan* error, while effectively undercutting the doctrine by granting excess discretion to trial judges.

E. The Penalty Phase

1. Preliminary Note: The Unpredictability of Capital Sentencing, and What That Suggests Regarding Treatment of Errors

The Court has held that a death sentence cannot be mandatory;¹⁹⁴ that, when sentencing, all relevant mitigating evidence must be considered;¹⁹⁵ and

192. *State v. Chester*, 724 So. 2d 1276, 1284-86 (La. 1998) (internal citations omitted).

193. See *State v. Hart*, 691 So. 2d 651, 656-57 (La. 1997) (venireperson not disqualified under *Morgan* precept even though he stated unequivocally that he thought the penalty for an intentional murder should automatically be death, since the juror also said that he could set that preconception aside and render a verdict in accordance with the instructions, but reversing conviction on other grounds); *State v. Bourque*, 622 So. 2d 198, 226-27 (La. 1993) (venireperson initially stated that he would automatically impose a death sentence for intentional murder and could not consider any mitigating circumstances, and his rehabilitation on this point was shaky, but reversing conviction on other grounds).

194. *Woodson v. North Carolina*, 428 U.S. 280, 302-05, 96 S. Ct. 2978, 2990-92 (1976) (mandatory death penalty for certain categories of murder impermissible); *Roberts v. Louisiana*, 428 U.S. 325, 331-34, 96 S. Ct. 3001, 3005-07 (1976) (same).

195. *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 2964-65 (1978).

that a juror cannot be precluded from giving effect to evidence that juror finds to be mitigating, even if all the other jurors disagree.¹⁹⁶ These rules, combined with the fact that all jury-sentencing capital jurisdictions require a death verdict to be unanimous,¹⁹⁷ make the outcomes of penalty phase proceedings unpredictable. This unpredictability is most manifest in cases that have a low to moderate level of aggravating circumstances,¹⁹⁸ but sometimes the outcome can be a surprise even in a seemingly slam-dunk, highly aggravated case:

Bernardino Sierra was mean, big and ugly, and he had done evil and inhuman things. In eight hours, he had committed twelve robberies, two maimings, and three killings. He had terrorized and tortured people. While one of his victims was lying on the ground with his face in a pile of broken glass, Sierra kicked him in the back of the head to drive glass into his eyes. Another victim also lay face down. Sierra raked his shotgun up the spine of this one, then fired into the wooden floor beside his head, exploding wood fragments into his head and neck. The experts said it was the "most likely case for capital punishment perhaps in the history of Harris County."

The jury heard the state's case and found Sierra guilty of capital murder. Now the jury was hearing further evidence to decide whether to sentence him to death.

When he was a little boy, his stepfather would come home drunk at night and beat him with a wire whip, catching him while he was asleep. His stepfather would lock him out of the house at night sometimes, and he would crawl under it to make his miserable bed and try to sleep. Often he was hungry and had no food. He ate out of garbage cans. He brought the best food he found there home for his mother and little sister.

His mother told this to the jury. Then his son, a beautiful little boy, got on the stand and told the jury, "That's my father." And the lawyer asked him, "What's the jury going to decide?" "Whether he lives or whether he dies," said the little boy.

The jury spared Sierra's life.¹⁹⁹

196. *Mills v. Maryland*, 486 U.S. 367, 375, 108 S. Ct. 1860, 1865-66 (1988).

197. See McCord, *supra* note 51, at n.85 (collecting statutes from 28 death penalty jurisdictions).

198. One of the best works concerning the level of heinousness of the offense vis-a-vis the likelihood of a death sentence is from David C. Baldus et al., *Equal Justice and the Death Penalty* (1990). These researchers used over 150 case variables to assign case culpability levels ranging from 1 (lowest) to 6 (highest) as to 483 Georgia homicides from 1973 to 1978. *Id.* at 44, 84-92. The death sentencing rates were as follows: Level 1 - 2%; Level 2 - 14%; Level 3 - 38%; Level 4 - 65%; Level 5 - 85%; and Level 6 - 100%.

199. Gary Goodpaster, *The Trial For Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 300-01 (1983).

The point is that given the highly subjective nature of a death penalty decision, it can never be clear what might have turned the verdict in the opposite direction had the jury heard—or not heard—it. It might be something that, in retrospect, seems inconsequential in light of the “more important” things that were presented at the penalty phase. The conclusion to which this leads me is that errors at the penalty phase in the admission of evidence for the prosecution, preclusion of evidence for the defense, improper prosecutorial argument, or incorrect jury instructions, should rarely be deemed harmless. This is not, though, the direction taken by either the United States or Louisiana Supreme Courts, as the following discussion will illustrate. The issue is complicated in a couple of instances, though, by the fact that the Louisiana Supreme Court has accorded capital defendants more rights than required by United States Supreme Court doctrine. In that circumstance, harmless error becomes a more supportable concept.

2. *Prosecution's Use of Inadmissible Evidence*

The United States Supreme Court has long been on record that a sentencer “may appropriately conduct an inquiry broad in scope and largely unlimited either as to the kind of information [it] may consider, or the source from which it may come.”²⁰⁰ The Court’s holding that a capital sentencer may not be precluded from considering “any aspect of a defendant’s character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death,”²⁰¹ is a two-edged sword: by implication it also gives the prosecution the right to introduce “any aspect of a defendant’s character or record” that impugns the defendant as a basis for seeking the death sentence, as well as permitting the prosecution to highlight the “circumstances of the offense,” although the “circumstances of the offense” pigeonhole gives rise to little appellate litigation because the damaging evidence relating to the circumstance of the offense has almost invariably already been properly admitted during the guilt/innocence phase. Further, the Court has approved the use of some victim impact evidence.²⁰² The law concerning impugning the defendant’s character or record, and victim impact evidence, will be considered separately below.

a. *Evidence Impugning the Defendant's Character or Record*

In virtually every death penalty jurisdiction, the defendant’s record for other serious criminal misconduct constitutes a statutory aggravating circum-

200. *United States v. Tucker*, 404 U.S. 443, 446, 92 S. Ct. 589, 591 (1972) (as to the federal system); *see also Williams v. New York*, 337 U.S. 241, 246-50, 69 S. Ct. 1079, 1082-85 (1949) (as to states being permitted to do likewise).

201. *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 2965 (1978).

202. *See Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 2610 (1991). For further discussion of *Payne*, *see infra* notes 223-226 and accompanying text.

stance.²⁰³ Further, some non-weighting jurisdictions permit the prosecution to prove non-statutory aggravating circumstances.²⁰⁴ The United States Supreme Court has only once suggested that any evidence concerning a defendant's criminal history is constitutionally required to be excluded. In *Dawson v. Delaware*,²⁰⁵ the Court held that the prosecution violated a defendant's rights at the penalty phase by presenting evidence impugning the defendant's character on the rather odd basis that a bare stipulation that the defendant belonged to the white racist prison gang called the Aryan Brotherhood, without showing that that gang had committed any particular illegal actions, violated the defendant's First Amendment freedom of association.²⁰⁶ This counterintuitive holding seems to be limited to its unusual facts, and has had no measurable impact on capital punishment jurisprudence. Thus, the Court has never set any significant limits on the ability of prosecutors to impugn defendants' characters or records in the penalty phase.

The Louisiana Supreme Court has broken lockstep and provided capital defendants with rights to exclude prosecution's evidence at the penalty phase beyond what has been required by the United States Supreme Court under the federal Constitution. These additional rights are premised on the Louisiana Supreme Court's rather broad interpretation of the import of *Gregg*:

The injection of arbitrary factors into the penalty phase of a capital trial can violate the defendant's due process rights. [citing *Gregg v. Georgia*, 428 U.S. 153 (1976)] Arbitrary factors are those which are entirely irrelevant or so marginally relevant to the jury's function in the determination of sentence that the jury should not be exposed to these factors; otherwise, the death penalty may be imposed "wantonly or freakishly" or for discriminatory reasons. [citing *Gregg*].²⁰⁷

203. Louis J. Palmer, Jr., *The Death Penalty: An American Citizen's Guide to Understanding Federal and State Laws* 110, 248 (1998) ("There are currently 33 capital punishment jurisdictions that make murder committed by a defendant with a prior felony or homicide conviction a statutory aggravating circumstance.").

204. In *Barclay v. Florida*, 463 U.S. 939, 967, 103 S. Ct. 3418, 3435 (1983), the court stated that "[a]lthough a death sentence may not rest solely on a nonstatutory aggravating factor . . . the Constitution does not prohibit consideration at the sentencing phase of information not directly related to either statutory aggravating or statutory mitigating factors, as long as that information is relevant to the character of the defendant or the circumstances of the crime." See also Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 Wm. & Mary Bill Rts. J. 345, 375 (1998) (canvassing law of capital jurisdictions regarding non-statutory aggravators). See also Blaine LeCesne, *Tipping the Scales Toward Death: Instructing Capital Jurors on the Possibility of Executive Clemency*, 65 U. Cinn. L. Rev. 1051, 1081 (1997) ("Most capital sentencing schemes confine the jury's consideration of aggravating circumstances to those specified by statute.").

205. 503 U.S. 159, 112 S. Ct. 1093 (1992).

206. *Id.* at 167, 112 S. Ct. at 1098.

207. *State v. Comeaux*, 699 So. 2d 16, 21-22 (La. 1997) (internal citations omitted).

Pursuant to its policy of preventing the injection of arbitrary factors into the penalty phase, the Louisiana Supreme Court has created three doctrines to limit the evidence prosecutors can use, although it later abandoned one of those doctrines. First, the court held that the prosecution must show by clear and convincing evidence that the defendant committed the other offense.²⁰⁸ This is the doctrine the court had already adopted with respect to the guilt phase of both capital and noncapital cases,²⁰⁹ and the court extended it to the penalty phase of capital trials.²¹⁰ Apparently prosecutors have had little trouble meeting this standard of proof, because I found only one instance during my six-year sample where the court found that the other misconduct was not proved against the defendant by clear and convincing evidence, and found it to be reversible error.²¹¹

The second doctrine the Louisiana Supreme Court has crafted to limit the scope of the prosecution's proof at the penalty phase was set forth in *State v. Jackson*.²¹² The court limited the prosecution to proving criminal conduct that involved violence against a person that was a felony, and as to which the period of limitations for instituting the prosecution had not run at the time of the capital indictment; limited the permissible evidence to the official document showing convictions and the testimony of the victim or eyewitness; and prohibited evidence of an original charge when the conviction was for a lesser charge.²¹³ The Louisiana Supreme Court has found three instances where error was committed in a capital sentencing phase under the *Jackson* rule, and in two instances found the error to be harmless because it did not inject an arbitrary factor into the sentencing,²¹⁴ and in one case found the error to be reversible because it did.²¹⁵

The third limitation was propounded in *State v. Bourque*.²¹⁶ There, the court held that anything beyond a minimal amount of evidence concerning the nonconviction misconduct was likely to distract the jury from the real issue of what sentence the defendant deserved for the crime for which he stood convicted,

208. See *State v. Brooks*, 541 So. 2d 801, 814 (La. 1989).

209. See *State v. Moore*, 440 So. 2d 134, 137 (La. 1983); *State v. Walker*, 394 So. 2d 1181, 1184 (La. 1973).

210. *Brooks*, 541 So. 2d at 814.

211. See *State v. Brooks*, 648 So. 2d 366, 375-77 (La. 1995).

212. 608 So. 2d 949 (La. 1992).

213. *Id.* at 955.

214. See *State v. Williams*, 708 So. 2d 703, 719 (La. 1998) (violation of *Jackson*'s limit of evidence to testimony of victims or eyewitnesses by presentation of testimony of police officer was harmless because it did not inject an arbitrary factor into the jury's deliberations); *State v. Tart*, 672 So. 2d 116, 132-33 (La. 1996) (admission of evidence of misdemeanor unauthorized use of a vehicle was harmless).

215. See *State v. Sanders*, 648 So. 2d 1272, 1282-91 (La. 1995) (error not harmless where state had violated *Jackson* ban against informing jury of original charges even though defendant had been convicted only on lesser charge, and violated *Jackson* by introducing evidence of an unadjudicated offense that would not constitute a crime at all in Louisiana, let alone a violent felony).

216. 622 So. 2d 198 (La. 1993).

and thus would constitute error.²¹⁷ But four years later the court abandoned this relatively inflexible "minimal evidence" standard for a more flexible case-by-case inquiry.²¹⁸ Thus, as long as the evidence of the non-conviction misconduct goes to show the defendant's character, a significant amount of detail concerning the conduct can be admitted. The only case in which the court ever found error of the *Bourque* variety during its four year life span was the *Bourque* case itself.²¹⁹

The current status of Louisiana Supreme Court doctrine regarding limitations on the prosecution's proof at the penalty phase strikes an appropriate balance. The clear-and-convincing standard of proof for other crimes, and the *Jackson* limitations are clear-cut and commonsensical; and the abandonment of *Bourque* is correct because it is not better for the jurors to have to speculate about the details of the prior crimes. It is even hard to fault the court for finding *Jackson* errors to be harmless, in light of the fact that the *Jackson* limitations give capital defendants greater protection than is required by United States Supreme Court doctrine.

b. Victim Impact Evidence

The United States Supreme Court in *Booth v. Maryland*²²⁰ and *South Carolina v. Gathers*²²¹ held that a whole panoply of victim impact evidence was constitutionally impermissible under the Eighth Amendment as irrelevant because it did not reflect on the defendant's blameworthiness: evidence and argument relating to the personal qualities of the victim, and the impact of the victim's death on the victim's family; and the victim's family members characterizations and opinions about the crime, the defendant and the appropriate sentence.²²² Four years later, in *Payne v. Tennessee*,²²³ the Court reversed *Booth* and *Gathers* as they related to evidence and argument relating to the victim and the impact of the victim's death on the victim's family:

We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar. A State may legitimately

217. *Id.* at 248 (state presented a prohibited "mini-trial" on the issue of the defendant's guilt or innocence of killing another victim by presenting numerous and detailed witnesses to that effect).

218. See *State v. Comeaux*, 699 So. 2d 16, 21-22 (La. 1997) (given the limitations already established by *Brooks* and *Jackson*, "*Bourque's* further limitation on the amount of admissible evidence, no matter how highly relevant to the defendant's character and propensities, was unnecessary to guarantee due process.").

219. 622 So. 2d at 248-49.

220. 482 U.S. 496, 107 S. Ct. 2529 (1987).

221. 490 U.S. 805, 109 S. Ct. 2207 (1989).

222. *Booth*, 482 U.S. at 508-09, 107 S. Ct. at 2536 (victim impact statements inadmissible); *Gathers*, 490 U.S. at 810-12, 109 S. Ct. at 2210-11 (prosecutor's comments about victim's personal characteristics impermissible).

223. 501 U.S. 808, 111 S. Ct. 2597 (1991).

conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.²²⁴

Since there are virtually no restrictions on the prosecution's use of "other relevant evidence," any such limits seem to be up to the states in their discretion to impose. As to the other types of victim impact evidence that had been excluded by *Booth* and *Gathers*—victims' family members' characterizations and opinions about the crime the defendant and the appropriate sentence—the Court did not have to directly address that issue in *Payne* because no such evidence had been permitted.²²⁵ The Court did indicate, however, a possible unwillingness to overrule *Booth* and *Gathers* on that point.²²⁶

Louisiana has imposed limits on victim impact evidence. In 1992, the Louisiana Supreme Court embraced the portion of *Booth* and *Gathers* that was apparently still good law—that a victim's family members' characterizations and opinions about the crime, the defendant and the appropriate sentence—were irrelevant.²²⁷ Further, the court held that only *some* of the evidence that was potentially admissible under *Payne* could be admitted in Louisiana:

[S]ome evidence of the murder victim's character and of the impact of the murder on the victim's survivors is admissible as relevant to the circumstances of the offense or to the character and propensities of the offender. To the extent that such evidence reasonably shows that the murderer knew or should have known that the victim, like himself, was a unique person in that the victim had or probably had survivors, and the murderer nevertheless proceeded to commit the crime, the evidence bears on the murderer's character traits and moral culpability, and is relevant to his character and propensities as well as to the circumstances of the crime. However, introduction of detailed descriptions of the good qualities of the victim or particularized narrations of the emotional, psychological and economic sufferings of the victim's survivors, which go beyond the purpose of showing the victim's individual identity and verifying the existence of survivors reasonably expected to grieve and suffer because of the murder, treads dangerously on the possibility of reversal because of the influence of arbitrary factors on the jury's sentencing decision. Whether or not particular evidence renders a

224. *Id.* at 827, 111 S. Ct. at 2608.

225. *Id.* at 830 n.2, 111 S. Ct. at 2611 n.2.

226. *Id.* at 833, 111 S. Ct. at 2612-13 (O'Connor, J., concurring) (taking pains to point out that that issue was not before the Court).

227. *State v. Bernard*, 608 So. 2d 966, 970 (La. 1992).

hearing so fundamentally unfair as to amount to a due process violation must be determined on a case-by-case basis.²²⁸

Two years later the Louisiana Legislature amended the Louisiana Code to provide: "The sentencing hearing shall focus on the circumstances of the offense, the character and propensities of the offender, *and the impact that the death of the victim has had on the family members.*"²²⁹ The Louisiana Supreme Court has held that both violations of the court-created restrictions and of the Louisiana statute are subject to harmless error analysis.²³⁰ The test is whether the verdict rendered "was surely unattributable to the error."²³¹ In the six cases in my sample where the defendants argued that improper victim impact evidence was permitted, the court either found error or was willing to assume error *arguendo* in five of them; but the court did not find any of them serious enough to be reversible.²³²

As with respect to the *Jackson* limitations regarding prosecution evidence of other crimes, it is hard to pick on the Louisiana Supreme Court's application of harmless error analysis to rights it has accorded beyond what is required by United States Supreme Court case law. Still, though, improper victim impact evidence seems to be one of the things that is most likely to affect jurors' decisions.

3. Preclusion of Defense's Use of Admissible Evidence

The United States Supreme Court in *Lockett* gave the defense broad latitude to introduce evidence at the penalty phase concerning mitigating aspects of the

228. *Id.* at 972.

229. La. Code Crim. P. art. 905.2(A) (emphasis added).

230. See *State v. Frost*, 727 So. 2d 417, 430 (La. 1998) (violation of statute by presenting testimony of nonfamily members judged under harmless error standard of whether verdict was surely unattributable to the error); *State v. Williams*, 708 So. 2d 703, 722 (La. 1998) (*Bernard* error subject to harmless error review).

231. *State v. Frost*, 727 So. 2d 417, 430 (La. 1998).

232. See *State v. Frost*, 727 So. 2d 417, 430 (La. 1998) (harmless error where prosecution violated the rule that only family members could testify as victim impact witnesses); *State v. Williams*, 708 So. 2d 703, 721-22 (La. 1998) (assuming *arguendo* it was improper to allow victim's family members to testify that they had "no sympathy" for the defendant, any such error was harmless); *State v. Koon*, 704 So. 2d 756, 773-74 (La. 1997) (victim impact evidence did not exceed that permissible under *Bernard*); *State v. Seals*, 684 So. 2d 368, 376-77 (La. 1996) (assuming *arguendo* it was error to allow the victim's wife to testify about the victim's former employment, his future job prospects, and his custom of treating her to fish dinners, any such error was harmless); *State v. Taylor*, 669 So. 2d 364, 369-74 (La. 1996) (assuming *arguendo* that allowing victim's relatives to testify that they had no sympathy for the defendant was error, it was harmless; and rejecting several other claims of improper victim impact evidence as not constituting error); *State v. Scales*, 655 So. 2d 1326, 1335-36 (La. 1995) (prosecutor's argument that the victim's family requested the death penalty even though they did not so testify was harmless because it was brief and unlikely to have influenced the jury in a prejudicial manner).

defendant's character or record, or the circumstances of the offense.²³³ The Supreme Court has never thereafter indicated whether *Lockett* error is subject to the harmless error rule, but it seems quite likely the Court would hold that *Lockett* error is "trial error" rather than a "structural defect."²³⁴ The Louisiana Supreme Court has never had to decide this issue because in the few instances where capital defendants have claimed on appeal that the trial court improperly excluded their mitigation evidence, the Court has held that the evidence defendants sought to offer was not relevant, and thus there was no error in excluding it.²³⁵

4. Improper Prosecutorial Comments

There is no United States Supreme Court precedent concerning what might constitute prosecutorial comment at the penalty phase sufficiently serious to amount to constitutional error. However, analogizing to the principle of *Darden v. Wainwright*²³⁶ from the guilt/innocence phase, the prosecutor's comments would have to be so egregious as to "infect[] the trial with unfairness as to make the resulting conviction a denial of due process."²³⁷ Given the required high level of egregiousness, plus the fact that the United States Supreme Court has not seen fit to decide any cases on the subject, it seems clear that the Court has decided to leave the policing of this issue to the state courts.

The Louisiana Supreme Court reviewed claims of error for prosecutorial improper comments at the penalty phase in more than one-third of the cases in my six-year sample. Sometimes the court found that there was no error committed by the prosecutor.²³⁸ More often, however, the court found

233. *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 2964-65 (1978).

234. It seems likely that under *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246 (1991), the court would find this to fall within the "evidentiary" definition of trial error, i.e., that "which may . . . be quantitatively assessed in the context of the other evidence. . . ." *Id.* at 307-08, 111 S. Ct. at 1264 (Rehnquist, J., concurring). At least two federal appellate courts have held that *Lockett* errors are subject to harmless error analysis. See *Sweet v. Delo*, 125 F.3d 1144, 1158 (8th Cir. 1997), and *Bolender v. Singletary*, 16 F.3d 1547, 1567 (11th Cir. 1994).

235. See *State v. Cooks*, 720 So. 2d 637, 644-47 (La. 1998) (evidence that another person who defendant was alleged to have attacked in prison was violent was irrelevant and properly excluded); *State v. Robertson*, 712 So. 2d 8, 35-36 (La. 1998) (testimony of polygraph examiner sought to be introduced by defendant at penalty phase was irrelevant); *State v. Langley*, 711 So. 2d 651, 658 (La. 1998) (no error in prohibiting defendant from presenting evidence of his supposed desire to plead guilty).

236. 477 U.S. 168, 106 S. Ct. 2464 (1986).

237. *Id.* at 181, 106 S. Ct. at 2471.

238. *State v. Brumfield*, No. 96-KA-2667, 1998 WL 727412 (La. Oct. 20, 1998) (prosecutor's comment on unadjudicated misconduct was proper); *State v. Robertson*, 712 So. 2d 8, 38 (La. 1998) (prosecutor's remark that defendant was uncooperative was fair comment on the evidence); *State v. Williams*, 708 So. 2d 703, 715-16 (La. 1998) (prosecutor's remarks were fair comment on the evidence and did not ask the jurors to engage in a plebiscite against crime); *State v. Bourque*, 699 So. 2d 1, 10 (La. 1997) (fair comment for the prosecutor to argue that the jury should not return a

prosecutorial comments to be error, or at least arguably so, yet always found any such error to be harmless.²³⁹ This gives improper prosecutorial comments the dubious distinction of being the kind of error most often found harmless. Once in awhile the court even notes that the prosecutor has skated dangerously close to reversibility, yet has not reversed.²⁴⁰

A time-honored argument in criminal law is whether an appellate court's finding error for prosecutorial comments but not reversing, even if scolding prosecutors in the process, has any real effect in checking prosecutorial overzealousness. More than half a century ago Judge Jerome N. Frank, in a

sentence less than death out of sympathy for the defendant's daughter); *State v. Sepulvado*, 672 So. 2d 158, 166 (La. 1996) (cross-examination of defense witness that implied the possibility of early release from a life sentence did not constitute error); *State v. Scales*, 655 So. 2d 1326, 1332-33 (La. 1995) (prosecutor's reference to death penalty was appropriate).

239. See *State v. Frost*, 727 So. 2d 417, 433 (La. 1998) (prosecutor's comments about his own childhood abuse as an attempt to weaken defendant's excuse for his behavior was error, but harmless); *State v. Tyler*, 723 So. 2d 939, 950 (La. 1998) (while prosecutor misled the jury somewhat in arguing that the prosecution experts were not paid while the defense experts were, such error was harmless); *State v. Robertson*, 712 So. 2d 8, 20-21 (La. 1998) (assuming *arguendo* that the prosecutor's reference to a presumption of intent from actions was erroneous, there was no prejudice because the error had been corrected by the trial judge); *State v. Langley*, 711 So. 2d 651, 664-65 (La. 1998) (assuming *arguendo* prosecutor's comments at penalty phase about defendant's diary were improper, any such error was harmless); *State v. Williams*, 708 So. 2d 703, 716 (La. 1998) (reference by prosecutor to his own handicapped mother to detract from defendant's excuse for his behavior was perhaps inappropriate but harmless); *State v. Bourque*, 699 So. 2d 1, 5-6 (La. 1997) (prosecutor's remarks that the jury's verdict would be a "recommendation" was harmless because no juror could have failed to appreciate the gravity of his or her responsibility); *State v. Seals*, 684 So. 2d 368, 376 (La. 1996) (unspecified prosecutorial comments throughout the trial did not constitute reversible error); *State v. Roy*, 681 So. 2d 1230, 1239-40 (La. 1996) (error by prosecutor in arguing for presumption of intent from actions was harmless because trial judge corrected the mistake); *State v. Mitchell*, 674 So. 2d 250, 257-58 (La. 1996) (prosecutor's remark that the state was only asking for the same penalty as the defendant had given the victims, only in a nicer manner, was harmless); *State v. Sepulvado*, 672 So. 2d 158, 166 (La. 1996) (prosecutor's reference to defendant, who had many women consorts, as a "harem king" was harmless); *State v. Taylor*, 669 So. 2d 364, 375-76 (La. 1996) (prosecutor's remark that any sentence other than death would be a "disgrace" was harmless); *State v. Scales*, 655 So. 2d 1326, 1333-35 (La. 1995) (harmless error for the prosecutor to quote another case by name, which is not permitted in Louisiana; to present the facts wrongly albeit not in a false or misleading manner; to speak of the lifestyle the defendant would live in prison); *State v. Sanders*, 648 So. 2d 1272, 1285-86 (La. 1994) (harmless error for the prosecutor to ask the jurors to take a stand against crime, but sentence reversed on other grounds); *State v. Martin*, 645 So. 2d 190, 200 (La. 1995) (assuming *arguendo* that it was error for the prosecutor to tell the jurors that the victim was looking down from heaven, and to characterize the defendant as a malevolent version of "the Beast" in the story "Beauty and the Beast" was harmless).

240. See, e.g., *State v. Taylor*, 669 So. 2d 364, 375 (La. 1996) ("The emphasized portion of this argument [that any penalty other than death would be a shame and a disgrace] treads dangerously close to reversible error, and we caution this prosecutor to refrain from such conduct in the future. Nevertheless, we find that this statement does not warrant reversal of the sentence under current harmless error standards.").

classic statement of the position doubting that such appellate conduct had any effect, stated that such reprimands were a "helpless piety"²⁴¹ with no effect:

Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the price of a ritualistic verbal spanking. The practice of this court—recalling the bitter tear shed by the Walrus as he ate the oysters—breeds a deplorably cynical attitude towards the judiciary.²⁴²

It appears that prosecutors of capital cases in Louisiana have used some self restraint, either from natural inclination or fear of reversal, because in my six-year sample the arguments by prosecutors are generally not "over the top." Several of the prosecutorial comment errors that the Louisiana Supreme Court found to be harmless seem to have been technical and unintentional misstatements of law which were later corrected by the trial judge.²⁴³ Even the more inflammatory arguments do not approach the level illustrated in *Darden v. Wainwright*.²⁴⁴ Nonetheless, Louisiana capital prosecutors have gotten away with oratorical excesses of at least moderate prejudicial effect. The four most glaring are: (1) calling the defendant, who had many relationships with women, a "harem king";²⁴⁵ (2) arguing that any sentence other than death would be "a disgrace";²⁴⁶ (3) admonishing that the victim was "looking down from heaven" at the jury's sentencing decision, and that the defendant was a malevolent version of "the Beast" in the story "Beauty and the Beast";²⁴⁷ and (4) arguing that the State was only asking that the defendant be given the same "penalty" as he had given the victims, only in a "nicer manner."²⁴⁸

It seems to me that it is time for the Louisiana Supreme Court to show that it has some "bite" on the issue of prosecutorial misconduct during the sentencing phase, rather than the mere "bark" that is evident from current Louisiana Supreme Court case law. I would urge that the next time the court feels that the prosecutor has made improper comments that are arguably reversible, the court should reverse to send the message to prosecutors that their oratorical zeal is not

241. *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir. 1946).

242. *Id.*

243. *State v. Robertson*, 712 So. 2d 8, 20-21 (La. 1998) (arguable error in comments regarding presumption of intent from actions corrected by trial judge instructions); *State v. Bourque*, 699 So. 2d 1, 5-6 (La. 1997) (prosecutor's remark about the jury's sentencing "recommendation" where nothing else in the record led the jurors to believe that the sentencing authority resided elsewhere); *State v. Roy*, 681 So. 2d 1230, 1239-40 (La. 1996) (prosecutor's comment about presumption of intent from actions corrected by trial court instruction).

244. 477 U.S. at 179-180 & nn.4-12, 106 S. Ct. at 2470-71 & nn.4-12 (prosecutor called the defendant an "animal" and stated several times that he wished the defendant had either killed himself or been shot by somebody else).

245. *State v. Sepulvado*, 672 So. 2d 158, 166 (La. 1996).

246. *State v. Taylor*, 669 So. 2d 364, 375 (La. 1996).

247. *State v. Martin*, 645 So. 2d 190, 200 (La. 1994).

248. *State v. Mitchell*, 674 So. 2d 250, 257 (La. 1996).

without potential serious adverse consequences. Surely the loss of one death sentence (which might very well be reimposed upon resentencing) would be a cost worth paying for the gain of reining in overzealous prosecutors.

Prosecutorial overzealousness in argument is particularly rankling in death penalty cases in Louisiana because it is so unnecessary. The facts of such egregious cases literally speak for themselves. Jurors are surely sufficiently disturbed about the perpetrator's deeds that there is nothing to be gained from prosecutorial rhetorical posturing. On the other hand, there is much to be lost in terms of over-emotionalizing an already emotional sentencing decision, and tarnishing the ideal of rational adjudication in this most wrenching of contexts.

5. Instructional Error

a. Camouflaged Harmless Error Doctrine #1: Defective and Unsupported Aggravators

Under some statutory death penalty schemes, once the defendant has been found to be in the category of those who are death-eligible, the sentencer is left to its own devices in determining how to use the aggravating and mitigating circumstances to arrive at a verdict. Such statutory schemes are referred to as "non-weighting" because the sentencer is not required in any specific manner to weigh the aggravating and mitigating circumstances against each other.²⁴⁹ Other jurisdictions have sentencing schemes that are referred to as "weighing" because the sentencer is explicitly instructed to, in some manner, weigh the aggravating circumstances against the mitigating in determining the sentence.²⁵⁰

Prosecutors often attempt to prove multiple aggravating circumstances against a defendant. If the sentencer finds more than one aggravating circumstance and renders a death sentence, it often occurs that the defendant will claim on appeal that one of the aggravating circumstances upon which the sentencer relied was defective, or unsupported by the evidence. The main way in which an aggravating circumstance can be *defective* is ambiguity. The primary aggravating circumstances that have been subject to ambiguity are the variants of "heinous, atrocious and cruel."²⁵¹ While such circumstances have generated

249. See Palmer, *supra* note 203, at 132-33 (explaining the process in non-weighting jurisdictions).

250. *Id.* at 130-32 (explaining the process in weighing jurisdictions).

251. See, e.g., Arave v. Creech, 507 U.S. 463, 471, 113 S. Ct. 1534, 1541 (1993) (aggravating circumstance that the defendant exhibited "utter disregard for human life," was saved by the Idaho Supreme Court's narrowing interpretation); Walton v. Arizona, 497 U.S. 639, 654-55, 110 S. Ct. 3047, 3057 (1990) (aggravating circumstance of "especially heinous, cruel or depraved" was saved from unconstitutionality by Arizona Supreme Court narrowing interpretation); Maynard v. Cartwright, 486 U.S. 356, 364-66, 108 S. Ct. 1853, 1859-60 (1988) (aggravating circumstance of "especially heinous, atrocious, or cruel," was unconstitutional unless saved by narrowing construction by state courts); and Godfrey v. Georgia, 446 U.S. 420, 430-33, 100 S. Ct. 1759, 1765-67 (1980) (aggravating circumstance which was "outrageously or wantonly vile, horrible or inhuman [in that

much litigation, the issue has largely been mooted through legislatures' and state appellate courts' narrowing constructions of such circumstances so as to permit them to withstand constitutional scrutiny.

The more important practical question is how a court should deal with a death sentence based on at least one supported-by-the evidence aggravating circumstance, and at least one aggravating circumstance claimed to be unsupported by the evidence. The answer to this question is that such a defendant stands little chance of reversal on appeal. This is because of two Supreme Court decisions, one applicable to "non-weighting" jurisdictions and the other to "weighting" jurisdictions.

As to non-weighting states, the 1983 case of *Zant v. Stephens*²⁵² is the governing precedent. There, the jury found, in accordance with the trial court's instruction, two aggravating circumstances: (1) that the murder was committed by a person with a prior record of conviction for a capital felony or a person with a substantial history of serious assaultive criminal convictions; and (2) that the murder was committed by a person who had escaped from the custody of a police officer or place of confinement.²⁵³ The jury sentenced the defendant to death.²⁵⁴ However, while his appeal was pending the Georgia Supreme Court held in another case that the phrase "a substantial history of serious assaultive criminal convictions" was unconstitutionally vague.²⁵⁵ The Georgia Supreme Court then decided, in *Stephens*' appeal, that his death sentence could stand despite one of the aggravating circumstances being invalid because the "mere fact that some of the aggravating circumstances presented were improperly designated 'statutory'" had "an inconsequential impact on the jury's decision regarding the death penalty."²⁵⁶ The United States Supreme Court refused to overturn the Georgia decision, reasoning that inasmuch as the jury could properly have heard the evidence of the defendant's criminal history anyway, the only error was that the jury had been instructed that such evidence was a statutory aggravating factor.²⁵⁷ The Court held that, while the label "aggravating circumstance" "arguably might have caused the jury to give somewhat greater weight to respondent's prior criminal record than it would otherwise have given,"²⁵⁸ the Georgia Supreme Court did not err in concluding that the error "cannot fairly be regarded as a constitutional defect in the sentencing process."²⁵⁹

it involved] torture, depravity of mind, or an aggravated battery to the victims," was unconstitutional without application of a state court narrowing construction).

252. 462 U.S. 862, 103 S. Ct. 2733 (1983).

253. *Id.* at 866, 103 S. Ct. at 2737.

254. *Id.* at 864, 103 S. Ct. at 2736.

255. *Arnold v. State*, 224 S.E.2d 386 (Ga. 1976).

256. *Stephens v. State*, 297 S.E.2d 1, 4 (1982).

257. *Zant v. Stephens*, 462 U.S. 862, 888, 103 S. Ct. 2733, 2748 (1983).

258. *Id.*, 103 S. Ct. at 2749.

259. *Id.* at 889, 103 S. Ct. at 2749.

The Court reached the same conclusion with respect to "weighing jurisdictions" in the 1990 case, *Clemons v. Mississippi*,²⁶⁰ as long as the appellate court re-weighed the non-defective, supported-by-the-evidence aggravating circumstances against the mitigating circumstances and concluded that death was the appropriate punishment.²⁶¹ In reaching this conclusion the Court implicitly held that the defendant did not have a constitutional right to a trial-level determination of sentence at all, and that it was constitutionally acceptable for the sentencing to be done by an appellate tribunal.²⁶²

The doctrine promulgated by *Stephens* and *Clemons* is a camouflaged harmless error doctrine. It allows an appellate court to ignore a clear constitutional error as long as the court believes that the error was unimportant in the context of the sentencing proceeding. Moreover, it is a species of harmless error analysis that does not, as in the *Chapman* test, explicitly allocate the burden to the prosecution to show that the error was harmless beyond a reasonable doubt. Rather, the doctrine from *Stephens* and *Clemons* has a close kinship with the *Harrington* "overwhelming evidence" approach.

Because Louisiana is a "non-weighing" jurisdiction,²⁶³ *Stephens* is the applicable precedent, and the Louisiana Supreme Court has not hesitated to use it. In numerous cases where a capital defendant has had one valid aggravating circumstance proven against him, yet alleged on appeal that another aggravating circumstance found against him was unsupported by the evidence, the Louisiana Supreme Court has made short work of the argument by citing the *Stephens* doctrine to hold that the court need not even consider the claim that there is a defective or unsupported aggravating circumstance unless it injected an arbitrary factor into the proceeding, something that the court never found in my six-year sample.²⁶⁴

260. 494 U.S. 738, 110 S. Ct. 1441 (1990).

261. *Id.* at 745, 110 S. Ct. at 1446.

262. *Id.* at 745-46, 110 S. Ct. at 1446-47.

263. See La. Code Crim. P. art. 905.3 ("A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed."). See also *State v. Hamilton*, 681 So. 2d 1217, 1227 (La. 1996) (no balancing required of aggravating and mitigating circumstances). Indeed, the Louisiana Supreme Court developed a *Stephens*-like doctrine before *Stephens* was decided. See *State v. Sawyer*, 422 So. 2d 95, 101 (La. 1982) (stating that a death sentence will be upheld if the sentencer properly found one of several alleged aggravating circumstances, as long as any unsupported aggravating circumstance did not inject an arbitrary factor into the sentencing process); and *State v. Monroe*, 397 So. 2d 1258, 1276 (La. 1981) (to same effect).

264. Such a challenge was raised by defendants in almost half the cases in my six-year sample (19 of 44). By far the most common claim was that the "heinous, atrocious and cruel" alleged aggravating circumstance was not sufficiently supported by the evidence. In nine of the nineteen cases, that aggravating circumstance was the only one challenged as being unsupported by the evidence. See *State v. Letulier*, No. 97-KA-1360, 1998 WL 378356 (La. July 8, 1998); *State v. Gradley*, No. 97-KA-0641, 1998 WL 252461 (May 19, 1998); *State v. Robertson*, 712 So. 2d 8, 44-45 (La. 1998); *State v. Craig*, 699 So. 2d 865, 873-74 (La. 1997); *State v. Lavalais*, 685 So. 2d

The *Stephens* and *Clemons* doctrines are wrong. *Clemons* is the more obviously wrong: when the state statute requires the sentencer to balance aggravating circumstances against mitigating, it certainly could make a determinative difference if the sentencer believes it has more valid aggravating circumstances on one side of the balance than are actually supported by the evidence. The Court got around this unavoidable conclusion only by holding that an appellate court could reweigh the circumstances, even though an appellate court works from the cold, paper record. Justice Blackmun in dissent was surely correct in asserting that, "[A]n adequate assessment of the defendant—a procedure which recognizes the 'need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual,'—surely requires a sentencer who confronts him in the flesh."²⁶⁵

Stephens is just as wrong, although less obviously so. Even in a non-weighting jurisdiction, the sentencer must figure out *some* way to compare the aggravating and mitigating circumstances, and as part and parcel of any rational method of doing this, one would expect the jurors to both consider the strength of the evidence supporting each aggravator, and to *count* the number of aggravators.²⁶⁶ Thus, a sentencer's belief that there are more adequately supported aggravators than have actually been proven could be a determinative factor even in a non-weighting jurisdiction.

1048, 1058 (La. 1996); *State v. Allen*, 682 So. 2d 713, 728 (La. 1996); *State v. Taylor*, 669 So. 2d 364, 382 (La. 1996); *State v. Martin*, 645 So. 2d 190, 201 (La. 1994); *State v. Davis*, 637 So. 2d 1012, 1030 (La. 1994). In five other cases, the "heinous, atrocious and cruel" aggravating circumstance was challenged as being insufficiently supported along with at least one other aggravating circumstance. See *State v. Ortiz*, 701 So. 2d 922, 935 (La. 1997) (additionally challenging support for aggravated circumstance of aggravated burglary and circumstance of risk to others); *State v. Connolly*, 700 So. 2d 810, 822 (La. 1997) (also challenging aggravating circumstance of aggravated rape); *State v. Comeaux*, 699 So. 2d 16, 28 (La. 1997) (also challenging aggravating circumstance of risk to others); *State v. Roy*, 681 So. 2d 1230, 1242 (La. 1996) (also challenging aggravating circumstances of aggravated burglary and armed robbery); *State v. Mitchell*, 674 So. 2d 250, 258 (La. 1996) (also challenging aggravating circumstance of aggravated burglary). The five cases that did not involve challenges to the "heinous, atrocious and cruel" aggravating circumstance were the following: *State v. Chester*, 724 So. 2d 1276, 1288-89 (La. 1998) (challenge to the sufficiency of the evidence of the aggravating circumstance of distribution of a controlled substance); *State v. Brumfield*, No. 96-KA-2667, 1998 WL 727412 (La. Oct. 20, 1998) (challenge to the aggravating circumstance evidence relating to intention to kill a police officer); *State v. Baldwin*, 705 So. 2d 1076, 1081 (La. 1997) (challenge to sufficiency of evidence regarding aggravated burglary); *State v. Koon*, 704 So. 2d 756, 776 (La. 1997) (challenge to sufficiency of evidence relating to aggravating circumstance of killing to eliminate eyewitnesses); *State v. Scales*, 655 So. 2d 1326, 1337-38 (La. 1995) (challenge to sufficiency of evidence relating to aggravating circumstance of causing great risk to others).

265. *Clemons*, 494 U.S. at 771, 110 S. Ct. at 1460 (Blackmun, J., dissenting).

266. See James Luginbuhl & Julie Howe, *Discretion In Capital Sentencing Instructions: Guided or Misguided?*, 70 Ind. L. J. 1161, 1173 (1995) ("Jurors appear to be influenced by whether the aggravating factors are stronger or more numerous than the mitigating factors." (emphasis added)).

The Court's response in *Stephens* is unconvincing: that even if the instruction "did induce the jury to place greater emphasis upon the [invalid aggravator] than it otherwise would have done,"²⁶⁷ no constitutional violation occurred because the jury could have heard the damning evidence anyway because the Constitution does not prohibit the presentation of non-statutory aggravating evidence.²⁶⁸ But the point is not whether the jury could have heard the evidence anyway, but whether the jury's being instructed that the evidence could be found sufficient to support a statutory aggravating circumstance—the very thing that renders the defendant death-eligible—might cause the jury to give it great weight in making the sentencing decision. If the jury does so, it is hard to see how the death sentence is reliable.

b. Ambiguous or Incorrect Instructions

The United States Supreme Court has adopted a hands-off approach to how states structure the capital sentencing determination as long as the state does not violate one of the rules of statutory death eligibility,²⁶⁹ and permits the sentencer to hear and consider all the relevant mitigating evidence.²⁷⁰ Thus, assuming (as is almost always the case nowadays) a state has a constitutionally acceptable death sentencing scheme, and the trial judge in a particular case has permitted the jury to hear all of the mitigating evidence, the trial court merely has to correctly instruct the jury under state law in order to avoid error. There are, however, two types of instructional error that can give rise to Eighth Amendment violations.

First, while an incorrect state law instruction in a *noncapital* case probably cannot give rise to a federal constitutional error,²⁷¹ an incorrect state law instruction at the penalty phase of a capital case that could have caused the jury to ignore relevant mitigating evidence does constitute Eighth Amendment error. The Court established this proposition in the 1990 case of *Boyde v. Califor-*

267. *Zant v. Stephens*, 462 U.S. 862, 888, 103 S. Ct. 2733, 2748-49 (1983).

268. *Id.*

269. See *Steiker & Steiker*, *supra* note 2, at 402 ("[C]ontemporary death penalty law is remarkably undemanding. The narrowing, channeling, and individualization requirements can be simultaneously and completely satisfied by a statute that defines capital murder as any murder accompanied by some additional, objective factor or factors and that provides for a sentencing proceeding in which the sentencer is asked simply whether the defendant should live or die.").

270. *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 2964-65 (1978).

271. See *Gilmore v. Taylor*, 508 U.S. 333, 342, 113 S. Ct. 2112, 2117 (1993) (citations omitted):

Nevertheless, *Boyde* was a capital case, with respect to which we have held that the Eighth Amendment requires a greater degree of accuracy and factfinding than would be true in a noncapital case. Outside of the capital context, we have never said that the possibility of a jury misapplying state law gives rise to federal constitutional error. To the contrary, we have held that instructions that contain errors of state law may not form the basis for federal habeas relief.

nia,²⁷² where the Court held that if there was "a reasonable likelihood" that the jury had interpreted an instruction to prevent its consideration of constitutionally relevant mitigating evidence, error had occurred under the Eighth Amendment. *Boyde* error is, though, subject to harmless error analysis.²⁷³ Second, under the doctrine of *Caldwell v. Mississippi*,²⁷⁴ the jury cannot be led to believe that "the responsibility of determining the appropriateness of the defendant's death rests elsewhere."²⁷⁵ While the United States Supreme Court has never opined on whether *Caldwell* error can be harmless, the Louisiana Supreme Court has held it to be.²⁷⁶

Apparently Louisiana trial courts have not had much difficulty in correctly instructing the jurors concerning the sentencing determinations in capital cases. The relatively few claims defendants have made of instructional error have almost all been clearly unmeritorious, and have been easily rejected by the Louisiana Supreme Court.²⁷⁷

The one case in which the court did find reversible instructional error was where the jury had been instructed about the governor's commutation power based upon a Louisiana statute that the Louisiana Supreme Court later found to be an unconstitutional violation of defendants' due process right to a fair trial.²⁷⁸ Even though the Louisiana Constitution was later amended to authorize such an instruction, the court held that the post-trial constitutional amendment could not retrospectively "clothe with constitutionality a statute that was constitutionally infirm" as of the time the instruction was given.²⁷⁹

272. 494 U.S. 370, 110 S. Ct. 1190 (1990).

273. See *Calderon v. Coleman*, 119 S. Ct. 500 (1998) (holding that the next step after a court finds *Boyde* error is to apply harmless error analysis).

274. 472 U.S. 320, 105 S. Ct. 2633 (1985).

275. *Id.* at 329, 105 S. Ct. at 2639.

276. See *State v. Bourque*, 699 So. 2d 1, 6 (La. 1997) (prosecutor's characterization of the jury's verdict on sentence as a "recommendation" was harmless because given the entire context of the proceeding, no jury could have failed to appreciate the gravity of its responsibility).

277. See *State v. Robertson*, 712 So. 2d 8, 41 (La. 1998) (failure to instruct on attempted perpetration of aggravated felony when the evidence overwhelmingly demonstrated that the crime was not only attempted but completed); *State v. Langley*, 711 So. 2d 651, 667 (La. 1998) (no error for court to not instruct on a presumption of life without parole since such was not the law); *State v. Koon*, 704 So. 2d 756, 772-73 (La. 1997) (trial court properly rejected requested instructions on "weighing" when Louisiana is a "non-weighing" jurisdiction); *State v. Bourque*, 699 So. 2d 1, 12 (La. 1997) (instruction that the jury was not to decide the sentence on the basis of sympathy was correct); *State v. Strickland*, 683 So. 2d 218, 237 (La. 1996) (where jury was required to find an aggravating circumstance in order to convict and the same aggravating circumstance had to be found at the sentencing, harmless for trial judge to instruct a jury that had found the aggravating circumstance at the guilt phase that that finding carried over to the penalty phase); *State v. Hamilton*, 681 So. 2d 1217, 1227 (La. 1996) (defendants requested instruction on "weighing" would have been improper in a "non-weighing" jurisdiction like Louisiana).

278. See *State v. Cousan*, 684 So. 2d 382, 392-94 (La. 1996) (relying on finding of unconstitutionality in *State v. Jones*, 639 So. 2d 1144, 1146 (La. 1994)).

279. *Cousan*, 684 So. 2d at 392.

6. *Camouflaged Harmless Error Doctrine #2: Ineffective Assistance of Counsel*

A criminal defendant charged with a serious crime has a constitutional right to counsel under the Sixth Amendment.²⁸⁰ Implied from this right is an affiliated right to have that counsel be effective.²⁸¹ If a defendant convinces a court on appeal that his trial counsel performed ineffectively, what approach should a court then use to determine whether this ineffective assistance was harmless? From the standpoint of logic and precedent this would seem to involve a two-part inquiry: (1) is ineffective assistance a "structural defect" that is automatically reversible?, and (2) if it is not, by what test should harmlessness be judged—the *Chapman* test or the *Harrington* test? While these tests can differ significantly in their results, each places the burden on the prosecution to prove that the error was harmless. This would mean that for the prosecution to be able to salvage a conviction on appeal when the defendant's trial lawyer had performed ineffectively, the prosecution would have to prove beyond a reasonable doubt that the error was harmless (under *Chapman*), or that the evidence in favor of death was overwhelming (under *Harrington*).

The Supreme Court, however, in the 1984 case of *Strickland v. Washington*,²⁸² eschewed this two-part inquiry for ineffective assistance claims. Instead, the Court held that if the defendant proved that counsel was ineffective, defendant still had to prove that the ineffective performance was prejudicial,²⁸³ i.e., that there were "reasonable probability" of a more favorable outcome had counsel performed effectively.²⁸⁴ The difference between this approach and what would follow from traditional harmless error doctrine is dramatic: on the "prejudice" element, traditional harmless error doctrine would place the burden on the prosecution to prove that the error was *not* prejudicial; the *Strickland* test places the burden on the defendant to prove by more than a minimal level of proof that the error was prejudicial. The Supreme Court did not attempt to explain why this particular constitutional error should be singled out for less defendant-favorable treatment on appeal than other sorts of constitutional error.

280. See *Gideon v. Wainwright*, 372 U.S. 335, 342-45, 83 S. Ct. 792, 795-97 (1963).

281. *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 1449 n.14 (1970).

282. 466 U.S. 668, 104 S. Ct. 2052 (1984).

283. *Id.* at 687, 692, 104 S. Ct. 2064, 2067.

284. See *id.* at 693, 104 S. Ct. at 2067 ("[A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice."). But a more likely than not standard is "not quite appropriate." *Id.* at 694, 104 S. Ct. at 2068. Instead "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* But one commentator has noted, "However, it is the allocation of the burden [on the prejudice prong of *Strickland*], rather than the standard, that is important. The party who bears the burden of proof of the virtually unprovable [possible change of outcome], by any standard, can be expected to lose." William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 Wm. & Mary Bill of Rights J. 91, 131-36 (1995).

The *Strickland* doctrine illustrates camouflaged harmless error doctrine: not only did the Court not use harmless error terminology, it later denied that the *Strickland* test involves harmless error analysis at all.²⁸⁵ This denial is, of course, implausible.²⁸⁶ If the Court were correct that *Strickland* does not involve a harmless error test, then presumably a court that found both parts of the *Strickland* test to have been met would need to undertake yet a third inquiry, namely, whether the error was nonetheless harmless. But no court, including the Supreme Court, undertakes such a third step because it would be nonsensical: if a court has already determined under *Strickland* that the error prejudiced the defendant, then a court has by definition determined that the error was not harmless. Thus, the second half of the *Strickland* test does indeed contain a camouflaged harmless error test that is very much less favorable to defendants than would be traditional harmless error analysis.

I will decline the opportunity to launch a broadside against the *Strickland* test, because others have done that effectively already.²⁸⁷ I will confine myself to two obvious points. First, while the standard of competence in the first part of the test—reasonably competent counsel—is arguably appropriate for a noncapital case, it is inappropriate for a capital case. Nobody should have to stand trial for his life with a merely adequate lawyer to represent him. Second, the even more pernicious part of *Strickland* is its prejudice component, which is distasteful for both noncapital and capital cases: a verdict or sentence obtained when the defendant's lawyer was constitutionally ineffective should either be automatically reversed out of fairness to the defendant and to protect the reputation of the criminal justice system, or, at the very least, only be permitted to stand if the prosecution can meet the *Chapman* burden of showing the error to have been harmless beyond a reasonable doubt. Further, even though the prejudice component is wrong as to both noncapital and capital cases, it is the most wrong as to the highly subjective penalty phase of a capital case, where even modest foul-ups by counsel can cause incalculable harm to the defendant.

285. See *Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2, 133 S. Ct. 838, 842 n.2 (1993): "Harmless error analysis is triggered only *after* the reviewing court discovers that an error has been committed. And under *Strickland v. Washington*, an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates (1) deficient performance and (2) prejudice."

286. See Geimer, *supra* note 284, at 131: "In spite of the Court's recent pronouncement [in *Lockhart v. Fretwell*] that *Strickland's* application does not involve harmless error analysis, the contrary is obviously true."

287. See, e.g., Stephen B. Bright, *Death By Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. Va. L. Rev. 679 (1990) (explaining the detrimental interaction between the *Strickland* test and the Supreme Court's line of procedural default cases for federal habeas corpus); Ivan K. Fong, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 Stan. L. Rev. 461, 482-85 (1987) (arguing that *Strickland's* prejudice requirement is inconsistent with the Court's capital punishment jurisprudence); Geimer, *supra* note 284 (challenging *Strickland's* prejudice requirement as inconsistent with the Court's other harmless error jurisprudence).

Strickland should be overruled by the United States Supreme Court. And the Louisiana Supreme Court should follow the courageous example of the Hawaii Supreme Court²⁸⁸ and break lockstep on this issue.

The Louisiana Supreme Court has, though, adopted the *Strickland* test.²⁸⁹ Usually the court will not consider claims of ineffective assistance of counsel on direct appeal, but will instead reserve them for postconviction proceedings.²⁹⁰ In three instances during my six-year sample, however, ineffective assistance of counsel was so glaring at the penalty phase that the court found the ineffective assistance on direct appeal and remanded for resentencing; there was nothing subtle about the ineffective assistance in those three cases, where defense counsel essentially performed no mitigation investigation, presented no mitigating evidence, and made no significant argument for a sentence less than death.²⁹¹ While the injustice of affirming such a sentence is apparent, the Louisiana Supreme Court still deserves credit for reversing in such cases because that result is not dictated by the *Strickland* test.²⁹² Under *Strickland*, a court could still affirm a sentence in the face of overwhelming neglect by defense counsel by holding either that the non-performance was a "strategic decision" and thus not ineffective, or that the defendant had not met the prejudice prong since the evidence in favor of the death sentence was so overwhelming.²⁹³ But the Louisiana Supreme Court has correctly recognized that there is no defendant whose life is completely devoid of mitigating circumstances, and thus no defendant whose counsel is absolved from the duty of vigorously litigating the penalty phase of the case.

288. The Hawaii Supreme Court rejected the *Strickland* prejudice component as being unduly difficult for a defendant to meet in *State v. Smith*, 712 P.2d 496, 500 n.7 (1986). See also *State v. Briones*, 848 P.2d 966, 977 (1993) (holding that actual prejudice is not required and that it is only necessary for the defendant to show the withdrawal or substantial impairment of a potentially meritorious defense).

289. See *State v. Fuller*, 454 So. 2d 119, 125 & n.9 (La. 1984).

290. See *State v. Brumfield*, No. 96-KA-2667, 1998 WL 727412 (La. Oct. 20, 1998) (citations omitted) ("A claim of ineffective assistance of counsel generally is more properly raised in an application for post-conviction relief than on appeal. In post-conviction proceedings, the district judge can conduct a full evidentiary hearing on the matter. However, when the record contains evidence sufficient to decide the issue, the appellate court may consider the issue in the interests of judicial economy.").

291. See *State v. Hamilton*, 699 So. 2d 29, 32-34 (La. 1997); *State v. Brooks*, 661 So. 2d 1333, 1337-39 (La. 1995); *State v. Sanders*, 648 So. 2d 1272, 1291-93 (La. 1994).

292. For a discussion of the *Strickland* test, see *supra* notes 282-284 and accompanying text.

293. Indeed, this was much the situation in the *Strickland* case itself where the defense lawyer became despondent over the weight of evidence against his client and his client's behavior, and essentially gave up the fight at the penalty phase. *Strickland v. Washington*, 466 U.S. 668, 672-73, 104 S. Ct. 2052, 2056-57 (1984). Nonetheless, the court held this to be a supportable strategic decision, *id.* at 699, 104 S. Ct. at 2070, and held that the evidence against the defendant was so overwhelming that any error did not cause prejudice to the defendant. *Id.* at 700, 104 S. Ct. at 2071.

V. CONCLUSION

A. *Is Death "Different" for Purposes of Harmless Error Analysis?*

Even though the United States Supreme Court has often gone on record in support of the proposition that "death is different," death is *not* different for the Court for the purpose of appellate review of claims of error. As to explicit harmless error doctrine, the Court has found no distinction between capital cases and non-capital cases in applying the "structural defect"/"trial error" dichotomy. Neither has the court used any stricter test in capital cases for determining whether trial error is harmless. As to camouflaged harmless error doctrines, the Court has used the *Strickland* standard in both capital and non-capital ineffective assistance of counsel cases. The penalty phase of capital cases is equally amenable to harmless error analysis. As to the capital case-specific issue of defective or unsupported statutory aggravating circumstances, the Court has used no standard of review at all as long as there is at least one sufficiently supported aggravating circumstance. Finally, concerning whether error can constitute "plain error," the Court has given no indication that capital cases should be treated any differently than non-capital cases. In short, for the United States Supreme Court, death is *not* different for the purpose of appellate review of claims of error.

The Louisiana Supreme Court has found three ways in which the differentness of death counsels for more lenient treatment of defendant's claims of error on appeal. First, that court will review all claims of error from the penalty phase of a capital case, whether they were properly preserved in the trial court or not. Second, the court continues to proclaim *Witt* error to be automatically reversible even though the United States Supreme Court precedent on which that view is premised has probably been overturned. And third, the Louisiana court holds violation of the *Morgan* precept to be automatically reversible based on state constitutional status of peremptory challenges.

B. *Should Death Be Different for Purposes of Harmless Error Analysis?: A Report Card on the Jurisprudence of the United States and Louisiana Supreme Courts*1. *The United States Supreme Court*

The United States Supreme Court's performance at the intersection of the death-is-different principle and harmless error doctrine must be given a failing grade. The Court's jurisprudence contains six major flaws, which I will list in roughly decreasing order of importance. First, the Court has failed miserably on perhaps the most crucial requirement of a capital proceeding: that the defendant have a really good lawyer. The Court requires no better than a barely adequate lawyer and then places the burden on the defendant to prove that any errors committed by that lawyer were prejudicial. Second, the Court has held, in defiance of logic, common sense and common fairness, that unsupported

aggravating factors can be treated as though they don't even exist. Third, the Court has indicated only limited willingness to accord capital defendants additional rights relating to the penalty phase under the culmination-of-the-process view. Fourth, the Court has not singled out the evidence-related portions of the penalty phase, under a culmination-of-the-process view, for particularly strict scrutiny. Further, the Court has not decided enough cases to provide any guidance to lower courts regarding how to handle claims of improper evidence at the penalty phase, including that which impugns the defendant's character, victim impact evidence, and improper prosecutorial argument. Fifth, the Court has cut capital defendants no slack under the plain error doctrine. Finally, the Court has failed in even the most basic task of making clear what the standard of review is for harmless error.

2. *The Louisiana Supreme Court*

The Louisiana Supreme Court has performed significantly better than the United States Supreme Court with respect to the intersection between the death-is-different doctrine and harmless error jurisprudence, and must be accorded a passing—although by no means perfect—grade. On the plus side, the Louisiana Supreme Court has consistently used a defendant-favorable standard for harmless error review, i.e., the *Chapman* test as restated in *Sullivan*; has accorded capital defendants more favorable treatment with respect to plain error issues at the penalty phase; has appropriately applied general harmless error standards to nonevidence-related issues and guilt/innocence phase evidence related issues; has developed acceptable limits on prosecution evidence at the penalty phase impugning the defendant's character and record; and has developed appropriate limitations on victim impact evidence. Further, the court has not been afraid to reverse death penalty cases when it finds what it believes to be serious error, having reversed thirty percent of the death sentences during my six-year sample.

On the other hand, the Louisiana Supreme Court's jurisprudence at the intersection of death-is-different doctrine and harmless error analysis has three of the top four defects I identified in my just-concluded analysis of the United States Supreme Court's jurisprudence. First, the Louisiana Supreme Court has adopted the defective *Strickland* test, although it must be acknowledged that the court has applied the test with more vigor than would seem to be required by the United States Supreme Court. Second, the Louisiana Supreme Court has adopted the *Stephens* approach of simply ignoring arguments about invalid aggravators as long as there is one sufficiently supported aggravator. Third, the court has not used any particularly strict scrutiny of errors related to the penalty phase in accordance with the culmination-of-the-process view, although this shortcoming is ameliorated by the court's adherence to the *Sullivan/Chapman* test for harmless error.

Further, there are two other areas in which Louisiana Supreme Court jurisprudence needs revision. First, beginning from the premise the court has adopted that a violation of the *Morgan* precept is reversible error, the court has

been too deferential to trial judges' overruling of defense challenges for cause. Second, the court has been satisfied to merely rebuke prosecutors who have made improper arguments rather than reversing a case or two to deter such conduct.

APPENDIX

<i>Case: State v.</i>	<i>Cite</i>	<i>Year Decided</i>	<i>Disposition</i>
1. Chester	724 So. 2d 1276	1998	Aff'd
2. Frost	727 So. 2d 417	1998	Aff'd
3. Brumfield	1998 WL 727412	1998	Aff'd
4. Tyler	723 So. 2d 939	1998	Aff'd
5. Cooks	720 So. 2d 637	1998	Aff'd
6. Letulier	1998 WL 37836	1998	Aff'd
7. Robertson ²⁹⁴	712 So. 2d 8	1998	Aff'd
8. Langley	711 So. 2d 651	1998	Aff'd
9. Williams	708 So. 2d 703	1998	Aff'd
10. Gradley	1998 WL 252461	1998	Aff'd
11. Baldwin	705 So. 2d 1076	1997	Aff'd
12. Koon	704 So. 2d 756	1997	Aff'd
13. Ortiz	701 So. 2d 922	1997	Aff'd
14. Connolly	700 So. 2d 810	1997	Aff'd
15. Bourque ²⁹⁵	699 So. 2d 1	1997	Aff'd
16. Comeaux	699 So. 2d 16	1997	Aff'd
17. (Wm.) Hamilton	699 So. 2d 29	1997	Conviction aff'd, remanded for resentencing due to ineffective assistance at penalty phase
18. Craig	699 So. 2d 865	1997	Aff'd
19. Hart	691 So. 2d 651	1997	Rev'd for insuffi- cient evidence of first-degree murder
20. Lavalais	685 So. 2d 1048	1996	Aff'd
21. Seals	684 So. 2d 368	1996	Aff'd
22. Cousan	684 So. 2d 382	1996	Conviction aff'd, remanded for resentencing due to jury in-

294. Same defendant as in 40. In case 40 Robertson's conviction and death sentence were reversed. The state retried Robertson and he was again sentenced to death. That conviction and sentence were affirmed in case 7. I have treated these two proceedings as two cases for purposes of my analysis.

295. Same defendant as in 42. In case 42 Bourque's death sentence was reversed. At resentencing he was again sentenced to death. This sentence was affirmed in case 15. I have treated these two proceedings as two cases for purposes of my analysis.

			struction regarding clemency power
23. Strickland	683 So. 2d 218	1996	Aff'd
24. Allen	682 So. 2d 713	1996	Aff'd
25. Divers	681 So. 2d 320	1996	Rev'd for retrial for fail- ing to sustain defendant's challenge of venireperson for cause
26. (Marcus) Hamilton	681 So. 2d 1217	1996	Aff'd
27. Roy	681 So. 2d 1230	1996	Aff'd
28. Mitchell	674 So. 2d 250	1996	Aff'd
29. Tart	672 So. 2d 116	1996	Aff'd
30. Sepulvado	672 So. 2d 158	1996	Aff'd
31. Taylor	669 So. 2d 364	1996	Aff'd
32. (George) Brooks	661 So. 2d 1333 & 647 So. 2d 339	1995, 1994	Conviction aff'd, remanded for resentencing due to ineffec- tive assistance at penalty phase
33. Cross	658 So. 2d 683	1995	Rev'd for retrial for failure to sustain defend- ant's challenge of venireperson for cause
34. Scales	655 So. 2d 1326	1995	Aff'd
35. Maxie	653 So. 2d 526	1995	Rev'd for retrial for failure to sustain defend- ant's challenge of venireperson for cause
36. (John) Brooks	648 So. 2d 366	1995	Conviction aff'd, remanded for resentencing due to improper- ly admitted

37. Sanders	648 So. 2d 1272	1994	evidence at penalty phase Conviction aff'd, remanded for resentencing due to improper use of other crimes evidence at the penalty phase and ineffective assistance at penalty phase
38. Martin	645 So. 2d 190	1994	Aff'd
39. Davis	637 So. 2d 1012	1994	Aff'd
40. Robertson	630 So. 2d 1278	1994	Rev'd for new trial for failure to sustain defendant's challenge of a venireperson for cause
41. Code	627 So. 2d 1373	1993	Aff'd
42. Bourque	622 So. 2d 198	1993	Conviction aff'd, remanded for resentencing due to improperly admitted evidence at the penalty phase
43. Hattaway	621 So. 2d 796	1993	Rev'd for retrial due to violations of right to counsel and privilege against self-incrimination
44. Hall	616 So. 2d 664	1993	Rev'd for retrial due to improper restriction of defense voir dire

